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# Scottish Jury Research: Findings from a Large Scale Mock Jury Study



**CRIME AND JUSTICE**



# **SCOTTISH JURY RESEARCH: FINDINGS FROM A LARGE-SCALE MOCK JURY STUDY**

**Rachel Ormston (Ipsos MORI Scotland)  
Professor James Chalmers (University of Glasgow)  
Professor Fiona Leverick (University of Glasgow)  
Professor Vanessa Munro (University of Warwick)  
Lorraine Murray (Ipsos MORI Scotland)**

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Though modified as appropriate to the Scottish context, some elements of the rape trial simulation drew on scripts prepared for previous ESRC research projects carried out by Vanessa Munro and Louise Ellison [RES 000-22-2374 and RES 000-22-4277]. Elements of the script for the assault trial simulation drew on Sheriff A L Stewart's *The Scottish Criminal Courts in Action* (2nd edn, 1997). Both scripts drew on the work of the Judicial Institute for Scotland in providing guidance to judges in the *Jury Manual*.

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# Key terms

Some of the key terms used in this report are set out here.

- *Accused*. A person charged with committing a crime or offence.
- *Beyond reasonable doubt*. The standard of proof in a criminal case (see also ‘standard of proof’ below). See section 4.3.1 for the standard judicial directions on reasonable doubt.
- *Complainer*. A person who, in criminal proceedings, claims to have been the victim of an offence.
- *Consent*. In Scottish criminal law, consent in a sexual offence case means that the complainer freely agreed to have a particular type of sexual contact with the accused. Most sexual offences require proof that the accused acted without the complainer’s consent.
- *Corroboration*. The requirement in a Scottish criminal case that, to find the accused guilty of a charge, there must be two separate sources of evidence that (a) the crime charged was committed, and (b) the accused was responsible for committing it.
- *Deliberations*. The process of discussion by which juries reach a verdict. In this research, mock juries were able to deliberate for up to 90 minutes.
- *Directions/jury directions/judge’s directions*. The instructions given by a judge to a jury at the end of a criminal trial that tell the jury the legal tests that they should apply.
- *Dominant juror*. A juror who contributes substantially more than most others in a particular jury.
- *Hung juries*. Where a jury is required to reach a certain majority (e.g. 10 votes out of 12) in order to return a verdict, and cannot do so, it is referred to as a ‘hung jury’. Hung juries are a feature of many jury systems, but Scottish juries cannot ‘hang’ as they have 15 members and return verdicts by a simple majority of votes.<sup>1</sup> This research included mock juries that returned simple majority verdicts, and so could not hang.<sup>2</sup> It also included mock juries that were required to reach at least near unanimity (10 of 12 members, or 13 of 15 members), which could hang if the minimum number of jurors required for a verdict was not reached.
- *Jury-level* and *juror-level*. This study examines both the verdicts reached by each mock jury following deliberation (*jury-level* data) and the views of individual participants (*juror-level* data). For a full discussion of this distinction and its relevance, see section 3.2.

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<sup>1</sup> If the number of jurors is reduced from 15 due (for example) to a jury member becoming ill during the trial, the accused cannot be convicted unless eight jurors support conviction.

<sup>2</sup> A 12-person jury which split evenly between conviction and acquittal would be deemed to have returned a verdict of not guilty: see section 1.1 below.



- *Jury size.* The number of people sitting on a given jury. Half of the mock juries in this study had 15 members (the current Scottish practice); the other half had 12 members.
- *Majority required.* The number of jurors required to support a verdict before it can be returned. Half of the mock juries in this study could return a verdict if a simple majority of jury members (eight of 15 members, or seven of 12 members) were in favour of it. This is referred to in this report as a 'simple majority' verdict. The other half were asked to try and reach unanimity (that is, all members agreeing). If they could not do this then they were permitted to return a 'near unanimity' verdict with no more than two jurors dissenting (that is, they required 10 votes from 12 or 13 votes from 15 to return a verdict).
- *Minimally contributing juror.* A juror who says very little during deliberations. In this research, a juror was described as 'minimally contributing' if they made fewer than three contributions, excluding non-verbal contributions (e.g. nodding), simple agreement (e.g. 'yes, I agree' with no expansion), or very short contributions made only as part of a 'going around the table' to check which verdict each juror supported.
- *Mock jury.* The juries in this study comprised members of the public who were eligible to serve on a jury, but were asked to come to a verdict based on a (fictional) filmed trial simulation, rather than a real criminal case. This is a well-established type of research which is normally referred to as 'mock jury research'.
- *Not proven.* Not proven is one of two acquittal verdicts available in Scotland (the other being not guilty). It has the same effect in law as not guilty.
- *Number of verdicts.* Half of the mock juries in this study had a choice of three verdicts: guilty, not guilty, and not proven. The other half had a choice of two verdicts: guilty and not guilty.
- *Pre-deliberation and post-deliberation.* Mock jurors in this study completed two questionnaires. The first, the *pre-deliberation* questionnaire, was completed immediately after they had watched the trial simulation but before deliberating with the other members of their jury. The second, the *post-deliberation* questionnaire, was completed after deliberations had concluded. The terms *pre-deliberation* and *post-deliberation* are used to refer to these two different stages.
- *Self-defence.* A legal defence to a crime of violence where the accused claims that they only used force against a person in order to prevent that person from attacking them. See section 4.3 for the legal test that applies to this defence.
- *Simple majority.* A rule requiring a majority of jurors (eight out of 15 or seven out of 12) to support a verdict before it can be returned. This is the rule that currently applies in Scotland.

- *Standard of proof.* The level of certainty needed to prove a legal claim. In a criminal trial this is “beyond reasonable doubt”. That is, the accused should only be convicted if jurors are satisfied beyond reasonable doubt of their guilt.
- *Trial simulation.* A realistic, but fictional, portrayal of a trial. This research included two filmed trial simulations (or ‘mock trials’) – a rape trial and an assault trial. These were performed by actors (with the exception of a retired judge, who performed that ‘role’), using scripts developed by the research team with advice from senior Scottish legal professionals.
- *Unanimity and ‘near unanimity’.* A rule requiring that either all, or almost all, jurors support a verdict before it is returned. Unanimity implies that every juror supports the verdict, while ‘near unanimity’ requires no more than two dissenting jurors (i.e. 10 out of 12 or 13 out of 15 must agree). In systems operating this rule, juries are usually asked to reach unanimity initially. However, if they are unable to do so, they are instructed that a ‘near unanimous’ verdict may be accepted. This is the rule that currently applies in England and Wales.
- *Verdict choice.* This report uses the term ‘verdict choice’ to refer either to the verdict chosen by the jury (i.e. the verdict actually returned), or to the verdict which individual jurors personally preferred (as indicated in their responses to questionnaires administered before and after deliberations), which may differ from the verdict returned by the jury as a whole. The report makes it clear in each case whether *jury-level* or *juror-level* verdict choice is being considered.

# Executive summary

This report presents the findings of a large-scale mock jury study in Scotland. The Scottish jury system differs from most English language jurisdictions in three main ways:

- **There are three verdicts:** guilty, not guilty and not proven (most major English language jurisdictions only have two verdicts: guilty and not guilty).
- **Each jury has 15 members** (rather than the typical 12).
- **Verdicts are returned by a simple majority** (eight out of 15 jurors, rather than requiring juries to reach unanimity or near unanimity).

The Scottish Government commissioned this study to address two overarching questions:

- **What effects do the unique features of the Scottish jury system have on jury reasoning and jury decision making?**
- **What are jurors' understandings of the not proven verdict and why might they choose this verdict over another verdict?**

## Research methods

This study is the largest of its kind ever undertaken in the UK, involving 64 mock juries and 969 individual participants. The research team staged jury deliberations between May and September 2018, in venues in central Glasgow and Edinburgh. Jurors were recruited to be broadly representative of the Scottish population aged 18-75 in terms of gender, age, education and working status. This meant that the mock juries were similar in demographic composition to the actual population eligible for jury service. In order to assess the effect of the Scottish jury system's unique features on decision-making, juries varied in terms of the number of verdicts available to them (two or three), jury size (12 or 15) and the size of majority they were required to reach (simple majority or unanimity).

Each jury watched a video of either a mock rape trial or a mock assault trial, lasting approximately one hour. Short clips from the two trials are available to watch online; links are in the footnote below.<sup>3</sup> Jurors completed a brief questionnaire recording their initial views on the verdict, before deliberating as a group for up to 90 minutes and returning a verdict (if the jury had been able to arrive at one). After returning their verdict, jurors completed a final questionnaire covering their beliefs about the not proven verdict and views about the deliberation process, as well as their final views on the verdict.

The data generated from the study included: quantitative data from the questionnaires; quantitative and qualitative data from the deliberations (which were filmed, audio recorded and analysed by the researchers); and quantitative 'metadata' on each jury (e.g. length of deliberations, verdict returned, etc).

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<sup>3</sup> Assault trial: <https://youtu.be/qxeU-sFzOxQ>; Rape trial: <https://youtu.be/kDAGaSedje8>; Judge's opening and closing directions: <https://youtu.be/ecemRns-gDk>

## Realism and study limitations

In comparison with many previous mock jury studies, this research was significantly more realistic. It used relatively long filmed trials rather than relying on transcripts, with the trials reviewed for realism by senior Scottish legal practitioners. It included a lengthy group discussion element (some studies either omit this or allow very limited time). Each mock jury included either 12 or 15 people (smaller groups are common in much mock jury research).

Nonetheless, it is important to bear in mind the limitations of any research involving mock juries. First, participants knew that they were not acting as jurors in a real trial. The vast majority of participants appeared to take the exercise seriously – as indicated by the fact that discussions between jurors who disagreed on the verdict regularly became animated. However, it is not possible to control for any impact that the artificial nature of the mock jury experience might have had on deliberations or verdicts.

Second, though the study was the largest of its type to date in the UK, the total number of juries (64) was nonetheless relatively small, making it unlikely that anything other than large differences in verdicts between juries would be picked up statistically. However, the 64 juries were made up of 863 individual jurors, each of whom was asked for their individual view on what verdict should be returned (using questionnaires).<sup>4</sup> This much larger sample of jurors means we can compare jurors asked to choose between two and three verdicts, those asked to reach a simple majority and those asked to reach a unanimous verdict, and jurors on 12 and 15-person juries.

This data can tell us whether or not particular features of the jury system might incline jurors in one direction or another (for example, whether being required to reach a unanimous decision might make a juror more or less likely to support an acquittal). As a result the research may indicate whether changes to the jury system, if applied across a larger number of finely balanced trials, might affect the likelihood of juries returning a particular verdict. However, we cannot use this data to arrive at an estimate of how many more juries might return a particular verdict.

Third, the findings in this study are based on jurors' responses to two specific trials, both of which were deliberately finely balanced in order to encourage discussion of the not proven verdict. Had the evidence in these trials been differently balanced, or had we used different kinds of cases, the balance between verdicts would probably have been different.

## Important note on the findings

As expected given the sample size, there were no statistically significant differences in the number of guilty versus acquittal verdicts returned between 12

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<sup>4</sup> An additional 105 'spare' jurors watched the trial videos and completed a questionnaire, but were sent home prior to deliberations to ensure that each jury only included either 12 or 15 people at this stage. Ipsos MORI recruiters deliberately recruited more jurors than were needed, to allow for non-attendance on the day. One further juror left immediately prior to deliberations, as they became unwell.

and 15-person juries, two-verdict and three-verdict juries, or between juries asked to reach a simple majority and those asked to reach a unanimous verdict.

However, there were a number of significant differences in the verdicts favoured by individual jurors. Therefore the key findings section below focuses primarily on what difference the unique features of the Scottish system make to individual jurors' verdict preferences, and to the process by which they reach their verdicts.

## **Key findings**

**The overarching finding is that juror verdicts were affected by how the jury system was constructed. The research found that the number of jurors, the number of verdicts available, and the size of majority required do have an effect on verdict choice.**

In other words, jurors' verdict preferences, in finely balanced trials, are not simply a reflection of their assessment of the evidence presented, but can also be affected by features of the jury system within which this evidence is considered.

### **What difference does the size of the jury make?**

#### **What difference does jury size make to verdict choice?**

**Jurors in 15-person juries were less likely to change their minds on the verdict than people in 12-person juries.**

Jurors in 15-person juries were more likely than jurors in 12-person juries to think the verdict should be guilty (after deliberating). However, this does not necessarily indicate that 15-person juries would be more likely to return guilty verdicts across a larger number of differently balanced trials. Rather, it may reflect the fact that, where a 15-person jury is split, more people (on average) need to change their position to facilitate a verdict than would be the case for a 12-person jury. This, in turn, may mean that 'minority' jurors in a 15-person jury have less motivation to shift their position to bring deliberations to a close. In this study, those supporting a guilty verdict were generally in the minority, but this will not always be the case. This finding may, therefore, indicate that individuals on larger juries are more likely to stick with their initial view, rather than indicating a greater propensity for larger juries to convict. This is supported by the finding that jurors in 15-person juries were less likely than jurors in 12-person juries to change their mind about the verdict.

#### **What difference does jury size make to how juries reach their verdicts?**

**15-person juries were associated with somewhat lower levels of juror participation than 12-person juries across a number of measures.**

For example, in 15-person juries: jurors were more likely to be observed wanting to contribute, but being unable to do so; there were more dominant jurors *and* more minimally contributing jurors; and jurors gave lower ratings of their own influence over the verdict.

However, the higher participation level in 12-person juries was not associated with longer deliberations: there was no difference in average deliberation length between 12-person and 15-person juries. Similarly, there was no difference

between 12 and 15-person juries in the number of evidential issues discussed, or the extent or accuracy of discussion of legal issues.

### **Potential implications of reducing jury size**

Taken together, these findings suggest that reducing the number of jurors on Scottish juries from 15 to 12:

- Might lead to more jurors participating more fully in the deliberations.
- Would be unlikely to have much impact on deliberation length or the range of evidential or legal issues discussed.

### **What difference does the size of the majority required make?**

#### **What difference does the majority required make to verdict choice?**

**Jurors who were asked to reach a simple majority were more likely to favour a guilty verdict than jurors asked to reach a unanimous verdict.**

However, this does not necessarily mean that requiring jurors to reach a unanimous verdict would result in fewer guilty verdicts. It might simply reflect a greater tendency for jurors to change from agreeing with the minority view to agreeing with the majority view (in 51 out of 64 juries, the majority wanted to acquit the accused at the start of deliberations). However, there is some evidence to suggest that jurors who are in the minority at the start of deliberations may be less willing to shift their view towards a majority preference for guilty than they would towards a majority preference for acquittal – five of the six unanimity juries that started with a majority for guilty could not reach a unanimous decision and ended up hanging, compared with only one of the 25 unanimity juries that started with a majority for acquittal.

#### **What difference does the size of the majority required make to how juries reach their verdicts?**

**Jurors asked to reach a unanimous verdict took substantially longer to deliberate than did those required to reach a simple majority.**

Although there were no significant differences between unanimity juries and simple majority juries in observed levels of juror participation, there were some differences in jurors' own perceptions of their involvement. In particular, jurors asked to reach a unanimous verdict were a little more likely to feel they had been fully involved and had influenced the jury's decision.

In combination with the longer average deliberation time for unanimity juries, this suggests that requiring juries to reach a unanimous verdict may provide greater opportunity for everyone to feel that they have been able to put their views across before a verdict is reached. It is worth noting, however, that this was not associated with any increase in the range of evidential issues discussed or the extent or accuracy of discussion of legal issues.

## Potential implications of changing the size of the majority required to reach a verdict

Taken together, these findings suggest that changing from the current simple majority system to unanimity:

- Might incline more jurors towards an acquittal – and might, therefore, lead to more acquittals over a larger number of trials. As noted above, however, it is not possible to estimate the likely scale of any such impact, since the effect will vary depending on factors including the balance of evidence and the initial balance of opinion in the jury in each trial.
- May lead to longer deliberations and more jurors feeling that they have been involved in the deliberations (although there is no evidence this would increase the range of evidential or legal issues discussed).

## What difference does the not proven verdict make?

### What difference does the not proven verdict make to verdict choice?

**Where the not proven verdict was available, acquitting juries tended to choose not proven rather than not guilty as the means to acquit the accused. Individual jurors were also less likely to favour a guilty verdict when the not proven verdict was available.**

26 out of 32 juries where not proven was available returned acquittals and, of those 26, 24 returned not proven verdicts and only two returned not guilty verdicts. This suggests that, in finely balanced trials, juries have a preference for acquitting via not proven rather than not guilty.

Individual jurors were significantly less likely to favour a guilty verdict when the not proven verdict was available. This difference was apparent both before and after deliberating, indicating that the availability of not proven has an effect on individual verdict preferences independent of any impact of group deliberation.

### What difference does the not proven verdict make to how juries reach their verdict?

**The presence or absence of the not proven verdict had little impact on the length of deliberations; the number of evidential issues raised; the extent or accuracy of the discussion of legal issues (other than discussion of the not proven verdict itself); or on levels of juror participation across various measures. However, its availability was associated with slightly lower levels of dissatisfaction (although not with significantly higher levels of satisfaction) with the experience of serving on a jury.**

## Potential implications of removing the not proven verdict

Taken together, these findings suggest that removing the not proven verdict:

- Might lead to more jurors favouring a guilty verdict, which might, therefore, lead to more guilty verdicts over a larger number of trials. As noted above, however, it is not possible to estimate the likely scale of any such impact, since the effect will vary depending on factors including the balance of evidence and the initial balance of opinion in the jury in each trial.



- May not have much impact on other key aspects of the jury decision-making process, such as deliberation length or juror participation.
- May be associated with a slight increase in juror dissatisfaction.

## **Were there any differences in the impact of jury size, majority required and the number of verdicts between the rape and assault trial?**

**In both the rape and the assault trials, requiring a unanimous verdict was associated with more jurors favouring acquittal after deliberation.**

The general pattern of differences in individual jurors' verdicts by both jury size and number of verdicts, reported above, was also similar across both trial types – in other words, individual jurors were less likely to shift their views in 15-person than in 12-person juries, and less likely to favour guilty when the not proven verdict was available. However, these differences were only statistically significant for the assault trial. Findings for individual trial types are based on around half the sample – 430 jurors. This means that bigger differences would be required to reach statistical significance.

## **How do jury size, majority required and the number of verdicts available interact with each other?**

Each unique feature of the Scottish jury system was independently and significantly related to the likelihood of individual jurors favouring a particular verdict in this research, in the ways described above. However, these features are also likely to interact in particular ways. Analysis of these interactions indicates that:

- **The size of the majority required is the feature that has the biggest impact on the likelihood of individual jurors changing their view on which verdict should be returned.** Jurors were more likely to change their view in juries asked to reach a unanimous verdict.
- **The combination of features that produced the most jurors in favour of conviction after deliberating was 15-person, simple majority, two-verdict juries.** In contrast, the combination which produced the lowest number of jurors favouring conviction was 12-person, unanimous, three-verdict verdict juries. Neither combination currently exists in practice, but the first combination (in which jurors were most likely to prefer a guilty verdict) is how the Scottish system would look if the not proven verdict were to be abolished without any other reforms taking place at the same time.

## **How do jurors understand the not proven verdict?**

**There was evidence of some inconsistency in jurors' understanding of what the not proven verdict means, along with some confusion over the consequences of not proven for the accused.**

It should be stressed, however, that while there was some uncertainty over the meaning of the not proven verdict, jurors relatively rarely expressed beliefs about the verdict that were definitively incorrect. This is in part because the not proven



verdict does not have a specific definition beyond it being one of two verdicts of acquittal. This leaves room for a number of different understandings of its meaning and purpose, which are explored below.

Across the 32 mock juries that had not proven as an option, the meaning and consequences of the not proven verdict were rarely discussed at any length during deliberations, even in juries where that verdict was returned. Where the not proven verdict was discussed, however, there was evidence of jurors holding inconsistent understandings of what the verdict meant, along with some confusion over its effect. In particular, jurors expressed uncertainty as to how it differed (if at all) from a not guilty verdict.

Although not proven and not guilty have the same effect in law, jurors tended to give different reasons for choosing them. Those who favoured the not proven verdict tended to base this on a belief that the evidence did not prove guilt beyond reasonable doubt, or on the difficulty of choosing between two competing accounts. Jurors choosing the not guilty verdict (where not proven was also an option), on the other hand, tended to attribute this to a belief that the accused was innocent or to some aspect of the complainer's or witness' evidence that suggested that they were not giving a truthful account.

The idea that the not proven verdict should be used when jurors think that the accused is probably guilty but that this has not been proven to the necessary standard arose frequently, albeit briefly, in deliberations. It was also the issue on which there was the clearest agreement in questionnaire responses. Jurors also expressed the view that there would be a lingering stigma attached to receiving a verdict of not proven.

### **Other implications: supporting juror understanding**

As discussed above, there is no evidence from this study that changing one or more of the unique features of the Scottish jury system would have an impact on the number of evidential issues or on the extent or accuracy of legal issues discussed during deliberations.

However, the findings do raise important questions about what can be done to support jurors' understanding of legal issues, including their understanding of the meaning and effects of the not proven verdict. Several potential misunderstandings on the part of individual jurors arose relatively frequently across the mock juries (e.g. a belief that the accused should prove his innocence, a belief that the accused can be retried following a not proven verdict but not a not guilty verdict, and misunderstanding of the fact that self-defence is a legitimate defence to an assault charge, even when the fact the accused inflicted the injury is not in dispute). This suggests a need to consider whether additional guidance (such as written routes to verdict or written reminders of key legal principles) would be helpful to aid jurors' discussions. Another strand of this research involved an extensive evidence review of ways in which juror communication methods might be improved: see J Chalmers and F Leverick, [\*Methods of Conveying Information to Jurors: An Evidence Review\*](#) (2018).

# 1. Introduction

## 1.1 Background to this study

The Post-Corroboration Safeguards Review was established by the Scottish Government to consider what additional safeguards and changes to law and practice might be required if the general requirement for corroboration in criminal cases was removed. Its final report recommended that “[t]he time is right to undertake research into jury reasoning and decision-making. Simultaneous changes to several unique aspects of the Scottish jury system should only be made on a fully informed basis.”<sup>5</sup>

There is a substantial body of jury research worldwide.<sup>6</sup> However, the vast majority is concerned with the traditional common law jury found in most major English language jurisdictions, which typically: has 12 members, a choice of two verdicts (guilty or not guilty), and is required to reach a unanimous verdict on which the whole jury is agreed.<sup>7</sup>

The Scottish jury, by contrast: has 15 members; chooses between three possible verdicts (guilty, not guilty and not proven); and is required to reach a ‘simple majority’ (eight out of 15 jurors) to return a verdict. Unlike the traditional common law jury, a Scottish jury cannot fail to reach a verdict (‘hang’), because 15 jurors cannot split in a way that allows this.<sup>8</sup>

There is very little existing evidence on what (if any) difference the distinctive features of the Scottish system make to the jury’s operation in practice, in comparison with the traditional common law jury. In 2017, the Scottish Government commissioned Ipsos MORI Scotland, in collaboration with Professors James Chalmers and Fiona Leverick (University of Glasgow) and Professor Vanessa Munro (University of Warwick), to undertake research on jury decision making. The

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<sup>5</sup> [Post-Corroboration Safeguards Review: Final Report](#) (2015) para 12.24.

<sup>6</sup> See e.g. the detailed paper prepared by researchers for Lord Justice Auld’s Review of the Criminal Courts of England and Wales: P Darbyshire, A Maughan and A Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (2002). More recently, see DJ Devine, *Jury Decision Making: The State of the Science* (2012), who states (at 8) that “1,500 is a plausible estimate of the number of published jury studies by the end of 2011”.

<sup>7</sup> Although the trend over time – and here practice varies from jurisdiction to jurisdiction – has been to permit the jury to return a verdict with either one or two jurors dissenting from that outcome. See J Chalmers, “Jury majority, size and verdicts”, in J Chalmers, F Leverick and A Shaw (eds), [Post-Corroboration Safeguards Review: Report of the Academic Expert Group](#) (2014) 140 at 143-151.

<sup>8</sup> While the three possible verdicts open to the jury mean that there may be no verdict which commands the support of eight or more jurors, such cases will always be regarded as an acquittal because not guilty and not proven have the same effect in law. Where jurors are split between the two acquittal verdicts, the rules differ depending on whether the jury deliberated with its full 15 members or not. Where the jury had 15 members, the verdict will be recorded as one of not guilty or not proven where there is a majority for that verdict amongst the jurors voting for acquittal, but an equal split between acquittal verdicts will be recorded as not proven: *Kerr v HM Advocate* 1992 SLT 1031. Where, exceptionally, the jury had an even number of members (if one or more of the initial 15 were unable to continue e.g. due to illness), such a jury, if split evenly between conviction and acquittal, will always be deemed to have returned a verdict of not guilty: Criminal Procedure (Scotland) Act 1995 s 90(2).

main element of the research was a mock jury study – the largest of its kind in the UK to date – involving 64 mock juries and 969 individual participants.

## 1.2 Research questions

The key research questions for this study were:

- **What effects do the unique features of the Scottish jury system have on jury reasoning and jury decision-making?**<sup>9</sup>
- **What are jurors’ understandings of the not proven verdict and why might they choose this verdict over another verdict?**

Specifically, the research explored whether there were any differences in jury reasoning and decision-making depending on:

- **The number of verdicts:** three verdicts (guilty, not guilty and not proven), or two verdicts (guilty and not guilty).
- **Jury size:** 15 members or 12 members.
- **The majority required** before jurors can return a verdict: a simple majority or unanimity among the whole jury.

In essence, the research was designed to test whether or not any of these features appears to incline juries in one direction or another in terms of their verdict and the process by which they arrive at this when other aspects (such as the trial content) are held constant.

Two further research questions focused on (i) effective methods for communicating with juries and (ii) the use of pre-recorded evidence. These questions were addressed by evidence reviews, published in 2018.<sup>10</sup>

## 1.3 What do we know from previous research?

In this section, we summarise the findings from the small body of existing jury research which is directly relevant to the distinctive features of the Scottish system (jury size, the majority required to return a verdict, and the not proven verdict).<sup>11</sup> In summarising findings, we also discuss some of the limitations associated with specific mock jury studies.<sup>12</sup> Appendix B includes a more detailed discussion of the

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<sup>9</sup> These were supplemented by a number of more detailed sub-questions, expanding on different aspects to be addressed in answering these over-arching questions (see Annex A for a full list of the research questions).

<sup>10</sup> J Chalmers and F Leverick, [Methods of Conveying Information to Juries: An Evidence Review](#) (2018); V Munro, [The Impact of the Use of Pre-Recorded Evidence on Juror Decision-Making: An Evidence Review](#) (2018).

<sup>11</sup> This is not to assert that the rest of the extensive body of existing research focused on the traditional common law jury is irrelevant to Scotland. It would be relevant to any policy decision to introduce a jury system more akin to the model found in most major English language jurisdictions, and might also be relied upon more generally if research suggested that the differences made by the distinctive features of the Scottish jury were limited in their effect.

<sup>12</sup> This does not imply any criticism of the researchers involved – highly realistic mock jury studies require significant resources, and variations in research methods are generally a result of resource constraints.

methods used in mock jury research in general, and the issues that should be considered in weighing findings from such studies.

### 1.3.1 Jury size

There is no existing research that specifically assesses the impact of having 15 jurors, as is the case in Scotland. However, researchers in the United States have examined the possible impact of reducing the traditional common law 12-person jury to a smaller size (usually six).<sup>13</sup> This research indicates that 12-person juries are preferable to smaller juries, on the basis that a smaller jury is less likely to be properly representative of the community, more likely not to contain members of minority groups, more likely to deliberate for a shorter time (at the expense of better deliberation), and possibly less likely to recall evidence accurately.<sup>14</sup> These findings do not, however, imply that increasing the size of the jury beyond 12 would necessarily have positive effects. Indeed, there is some evidence suggesting that the efficacy of group decision-making can be impeded as groups increase in size.<sup>15</sup>

### 1.3.2 The majority required for a verdict: simple majority and unanimity

There is no prior research that has directly considered the impact of the Scottish requirement that jurors reach a 'simple majority' before returning a verdict. However, researchers have examined the effect of requiring different majorities for a verdict. For example, Hastie, Penrod and Pennington's extensive *Inside the Jury* research compared three different decision rules: one requiring all 12 jurors to agree unanimously, one requiring 10 votes out of 12 for a verdict, and one requiring eight votes out of 12.<sup>16</sup> Other studies have generally compared a requirement of absolute unanimity with an alternative somewhat short of this (such as a rule requiring two-thirds or more of jurors to agree on a verdict).<sup>17</sup>

Such research suggests, unsurprisingly, that juries are more likely to hang (fail to reach a verdict) when all jurors are required to agree unanimously compared with requiring a majority short of unanimity.<sup>18</sup> There is also some evidence to suggest that requiring jurors to reach a unanimous verdict may be associated with better quality deliberation – "deliberations are likely to be evidence driven and more thorough than when a majority rule is in place".<sup>19</sup>

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<sup>13</sup> This research arose out of decisions of the US Supreme Court which concluded that the size of a jury could not be reduced below six members without violating an accused's Sixth Amendment right to jury trial. See *Williams v Florida* 399 US 78 (1970); *Ballew v Georgia* 435 US 223 (1978).

<sup>14</sup> MJ Saks and MW Marti, "A meta-analysis of the effects of jury size" (1997) 21 *Law and Human Behavior* 451.

<sup>15</sup> See J Chalmers, "Jury majority, size and verdicts", in J Chalmers, F Leverick and A Shaw (eds), *Post-Corroborator Safeguards Review: Report of the Academic Expert Group* (2014) 140 at 156.

<sup>16</sup> R Hastie, SD Penrod and N Pennington, *Inside the Jury* (1983) 60.

<sup>17</sup> See e.g. the research surveyed in R Hastie, SD Penrod and N Pennington, *Inside the Jury* (1983) 29-32.

<sup>18</sup> R Hastie, SD Penrod and N Pennington, *Inside the Jury* (1983) 60.

<sup>19</sup> BH Bornstein and E Greene, "Jury decision making: implications for and from psychology" (2011) 20 *Current Directions in Psychological Science* 63 at 65.

### 1.3.3 The not proven verdict

There has been limited research to date on the effect of the not proven verdict, and that which exists has a number of limitations. First, previous studies of not proven have used trial summaries (either written or audio), which is less realistic than showing jurors audio-visual recreations of trials. Second, all but one study to date involved jurors returning individual verdicts, rather than deliberating as a group as they would in a real trial.<sup>20</sup>

Bearing these limitations in mind, one of the four published studies found that having the not proven verdict available was associated with jurors being significantly less likely to convict. Differences in the other studies were not statistically significant (though they tended to point in the same direction).<sup>21</sup>

There is also very limited evidence on jurors' understanding of the not proven verdict. Where this has been examined, the focus has often been on beliefs about the possibility of a retrial after a not proven verdict. According to the *Jury Manual*, it is "thought to be good practice" for judges in criminal trials to "inform the jury specifically that 'not proven' is a verdict of acquittal and that the accused cannot be tried again for the same offence".<sup>22</sup> However, a 1993 opinion poll commissioned by the BBC found that 48% of the Scottish public wrongly believed that a not proven verdict meant the accused could be retried if new evidence became available.<sup>23</sup> Similar views have also been observed in mock jury studies. For example, Hope and others<sup>24</sup> found that around a third of participants believed the accused could be retried after a not proven verdict, despite having heard judicial instructions stating this was not possible.<sup>25</sup> They also observed a strong perceived 'stigma' associated with the not proven verdict.<sup>26</sup>

A small number of mock jury studies have also examined differences in whether jurors returning not proven verdicts were more likely to think the accused was probably guilty (but the evidence was insufficient for a conviction) than those

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<sup>20</sup> The one study ('Study 2', as reported in L Hope and others, "A third verdict option: exploring the impact of the not proven verdict on mock juror decision making" (2008) 32 Law and Human Behaviour 241) which involved deliberation used groups of four to eight jurors, much smaller than the Scottish jury of 15 members. In addition, the existing studies discussed here (except Hope and others, Study 2) relied heavily on the use of students as mock jurors, rather than a broader community sample.

<sup>21</sup> See Annex C for more detail on existing studies of the not proven verdict.

<sup>22</sup> Judicial Institute for Scotland, *Jury Manual* (2019) 107.1. The mock juries in the present study were directed by the judge in accordance with this practice.

<sup>23</sup> K Bruce, "Not proven verdict leaves 60% of Scots in dark, claims poll", *The Herald* 13 May 1993, p 2. A further 11% said that they did not know. Following the Double Jeopardy (Scotland) Act 2011 it is now, in some circumstances, possible to prosecute an acquitted person again if new evidence becomes available, but this does not depend in any way on the initial verdict having been not proven rather than not guilty. See further section 5.4.2.

<sup>24</sup> L Hope and others, "A third verdict option: exploring the impact of the not proven verdict on mock juror decision making" (2008) 32 Law and Human Behaviour 241.

<sup>25</sup> At 246 (35% of participants who had the option of three verdicts).

<sup>26</sup> At 249.



returning not guilty verdicts. Curley and others<sup>27</sup> found that ratings of ‘likelihood of guilt’ were considerably higher among those who favoured not proven compared to those who preferred not guilty (a mean of 58.0 compared to 39.2).<sup>28</sup> In contrast, Hope and others did not find any significant difference in ‘likelihood of guilt’ ratings between jurors who favoured not proven and jurors who favoured not guilty.<sup>29</sup>

## Summary

In summary, in so far as existing jury research has engaged with the key research questions in the present study, it suggests that:

- 12-person juries generally have higher quality deliberations than smaller juries. However, it is unclear whether increasing jury size further (to 15) has any benefits.
- Requiring jurors to reach ‘unanimity’ may make deliberations more thorough, but may also result in more ‘hung’ juries. There is no existing research on the Scottish ‘simple majority’ requirement.
- Evidence on the not proven verdict’s impact is equivocal but suggests that jurors may be less likely to convict when the not proven verdict is available.
- There are some misunderstandings about the possibility of a retrial after a not proven verdict. Some limited evidence also suggests that jurors who favour not proven may be more likely than jurors who favour not guilty to think the accused is probably guilty.

The research questions for this study clearly cannot be fully answered on the basis of existing evidence. It is in this context that the Scottish Government commissioned the large-scale mock jury study which is the focus of this report.

## 1.4 Report structure

The remainder of this report is structured as follows:

**Chapter 2** describes the research methods for our mock jury study. It explains the steps taken to maximise realism and the limitations of the study.

**Chapter 3** presents findings on the effects of the unique features of the Scottish jury system (three verdicts – including not proven, 15 jurors, and requiring a simple majority verdict) on verdict choice.

**Chapter 4** discusses how the unique features of the Scottish jury system impact on the way in which juries reach their decisions.

**Chapter 5** examines juror understandings of the not proven verdict.

**Chapter 6** summarises the conclusions and discusses the potential implications of any changes to the unique features of the Scottish jury system.

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<sup>27</sup> LJ Curley and others, “Threshold point utilisation in juror decision-making” (2019) 26 *Psychiatry, Psychology and Law* 110.

<sup>28</sup> At 118.

<sup>29</sup> L Hope and others, “A third verdict option: exploring the impact of the not proven verdict on mock juror decision making” (2008) 32 *Law and Human Behaviour* 241 at 245.

**Annexes A to K** contain further detail on the study aims, background and methods, including: the full research questions, a summary of issues to consider when assessing mock jury research, a more detailed summary of previous research on the not proven verdict, summaries of the content of the trial videos used in the research, copies of the research materials, and details of the statistical tests used. They also include additional findings tables, and the remit and membership of the Research Advisory Group for the project.

The **key terms** section at the start of this report explains some of the key legal and other terms referred to in this report.

## 2. Methodology

### 2.1 Summary of approach

In Scotland, the Contempt of Court Act 1981 prohibits questioning jurors who have participated in actual criminal trials about their discussions during deliberation. The research questions set out in Chapter 1 were therefore addressed by a large-scale mock jury experiment.

64 juries watched a video of either a mock rape or a mock assault trial, then deliberated in groups for up to 90 minutes before returning a verdict. In order to assess the effect of the Scottish jury system's unique features on jury reasoning and decision-making, the 64 mock juries varied with respect to:

- **Number of verdicts** – 32 juries had two verdicts (guilty and not guilty) and 32 had three verdicts (guilty, not guilty and not proven) available to them.
- **Jury size** – 32 juries deliberated in groups of 12, and 32 in groups of 15.
- **Majority required** – 32 juries were asked to reach a unanimous verdict, on which each member of the jury was agreed, and 32 were asked to return a simple majority verdict (seven out of 12 or eight out of 15 jurors).

In combination with trial type (rape or assault), this resulted in 16 possible combinations, with each combination run four times (see Table 2.1, below).



Table 2.1 Summary of conditions for mock juries

Condition number	Jury size (15 or 12)	Majority required (simple majority or unanimous)	Number of verdicts (three or two)	Trial type	Number of experiments (mock juries) per condition	Number of jurors per condition
1	15	SM	3	Rape	4	60
2	15	SM	2	Rape	4	60
3	15	U	3	Rape	4	60
4	15	U	2	Rape	4	60
5	12	SM	3	Rape	4	48
6	12	SM	2	Rape	4	48
7	12	U	3	Rape	4	48
8	12	U	2	Rape	4	48
9	15	SM	3	Assault	4	60
10	15	SM	2	Assault	4	60
11	15	U	3	Assault	4	60
12	15	U	2	Assault	4	60
13	12	SM	3	Assault	4	48
14	12	SM	2	Assault	4	48
15	12	U	3	Assault	4	48
16	12	U	2	Assault	4	48
<b>Total</b>					<b>64</b>	<b>864</b>

The remainder of this chapter explains each aspect of the research methods in more detail, including efforts to maximise realism.

## 2.2 The participants ('mock jurors')

'Mock jurors' were recruited in Edinburgh and Glasgow from members of the general public eligible for jury service by Ipsos MORI specialist recruiters, using a recruitment questionnaire developed by the research team. We recruited more jurors than required for each session, to ensure that we were able to run each jury with either 12 or 15 jurors after allowing for 'no shows' on the day. In practice, this meant that there were sometimes more jurors than required. In total, 863 jurors

participated in deliberations across the 64 juries.<sup>30</sup> An additional 105 'spare' jurors watched the trial videos and completed a questionnaire before being sent home (see 2.4, below, and questionnaire C in Annex E).

Recruiters obtained informed consent to participate at the time of recruitment. The researcher responsible for each jury also reminded participants at the outset that they were volunteers and were free to leave at any time. All mock jurors were given a £50 thank-you payment in recognition of the time they had given up to participate, and a helpline leaflet in case they had found aspects of the evidence or process distressing.

### **2.2.1 Mock juror characteristics**

Quotas for recruiting jurors were based on the profile of the Scottish population aged 18-75 (75 was set as an upper limit, since those aged 71+ can be excused from jury service on grounds of age). While there is no directly relevant Scottish data, research in England and Wales found that – contrary to common myths about certain groups being under- or over-represented in jury composition – “serving jurors were remarkably representative of the local community in terms of ethnicity, gender, income, occupation and religion”.<sup>31</sup>

Table 2.2 shows the profile of jurors who (a) participated (n = 969) and (b) actually went on to deliberate (after 'spare' jurors were sent home, n = 863), compared with the profile of the Scottish population aged 18-75. Overall, the profile was fairly similar to that of the Scottish population in terms of gender and age group (although slightly more women participated overall, the gender balance of those who deliberated was closer to the actual population figures<sup>32</sup>). In comparison with the population as a whole, slightly fewer jurors indicated that their highest qualification was at school-level or below. However, 10% of participants did not answer the survey question about their highest qualification. As lower educational attainment is often associated with non-response in questionnaires,<sup>33</sup> it is possible that this group includes more people with no or low qualifications than with higher level qualifications.

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<sup>30</sup> One 12-person jury proceeded with 11 jurors, as a juror went home ill immediately before the start of deliberations. A real trial can similarly proceed where a juror falls ill and can no longer participate: Criminal Procedure (Scotland) Act 1995 s 90.

<sup>31</sup> C Thomas, “Exposing the myths of jury service” [2008] Criminal Law Review 415 at 422.

<sup>32</sup> Where more than 12/15 jurors attended, researchers tried to ensure gender and age balance in the juries when selecting 'spare' jurors.

<sup>33</sup> G Reyes, “Understanding non response rates: insights from 600,000 opinion surveys” (World Bank, 2016).

Table 2.2 – Profile of jurors who participated in mock juries

	All jurors who participated	All jurors who deliberated	Scottish population aged 18-75*
<b>Gender</b>			
Male	44%	46%	49%
Female	55%	53%	51%
Describes self in another way / not answered	1%	2%	NA
<b>Age</b>			
18-34	31%	32%	31%
35-54	39%	38%	37%
55+	28%	29%	32%
Prefer not to say / not answered	1%	1%	NA
<b>Highest qualification</b>			
Standard grade or below	29%	29%	36%
Higher or equivalent	17%	17%	18%
HND or equivalent	16%	16%	12%
Degree-level or higher	28%	28%	30%
Unsure / Refused / Not answered / Other	10%	10%	4%
<b>Sample size</b>	969	863	

\* Source for population figures: Gender and Age = NRS Mid-year population estimates 2016 (the most up to date estimates available at the time quotas were set). Highest qualification: Scottish Household Survey data, restricted to 16-74 year-olds.

## 2.3 The trial videos

Each mock jury watched one of two filmed case simulations of around one hour in length – a rape trial (in which the accused claimed that the complainer consented to sexual intercourse), or an assault trial (in which the accused claimed he acted in self-defence). Summaries of the content of the trials are included in Annex D. Short extracts from the trial films are available to watch online:

- Assault trial: <https://youtu.be/gxeU-sFzOxQ>

- Rape trial: <https://youtu.be/kDAGaSedje8>
- Judge's opening and closing directions: <https://youtu.be/ecemRns-gDk>

The trials were filmed by a professional film company<sup>34</sup> at the High Court in Edinburgh. All roles were played by actors, with the exception of a retired judge who performed that 'role' in the films. The trials were fully scripted by the research team, with the scripts reviewed by members of the Scottish Government's Research Advisory Group (RAG) (which included a judge, a sheriff, an advocate and a solicitor). A second advocate and retired sheriff, independent of the RAG, reviewed the scripts and observed rehearsals and filming, providing advice on realistic delivery to the actors.

The legal instructions given to the jury were based on the standard directions recommended in the Judicial Institute for Scotland's *Jury Manual*,<sup>35</sup> supplemented by advice from the RAG, independent legal advisors, and the judge who performed that role in the films.<sup>36</sup>

The purpose of this research was to test whether – whilst holding other aspects of the trial constant – the different features of the Scottish jury system appear to incline juries in one direction or another in terms of both verdict choice, and deliberation process. It also aimed to explore understandings of the not proven verdict in particular. The scripts for both trials were therefore deliberately drafted to generate a degree of ambiguity, in order to encourage debate within the jury room about guilt and acquittal, and to maximise the likelihood that jurors would consider the difference between the not guilty and not proven verdicts.

In line with Table 2.1 above, eight versions of each trial film were produced. These were entirely identical (within trial type), with the exception of the very final section, in which the judge tells the jury about the verdicts available and the majority required for a verdict to be returned. When the jury was required to try and return a unanimous verdict, a supplementary direction from the judge was recorded (to be played if the jury failed to reach a verdict after 70 minutes). This indicated that a verdict could now be accepted provided that no more than two members of the jury disagreed with it (i.e. a near unanimous verdict).

A small focus group of 'mock jurors' was present for the live rehearsals of each trial, which preceded filming. The research team also piloted the films with eight mock juries prior to the main fieldwork. Both exercises were used to check that participants found the simulations sufficiently realistic, and that they provoked an appropriate level of ambiguity and discussion. Minor changes were made to the scripts following the live rehearsals, and minor editing changes were made to one of the filmed case simulations following the pilot.

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<sup>34</sup> Heehaw, based in Edinburgh.

<sup>35</sup> Available at <http://www.scotland-judiciary.org.uk/Upload/Documents/JuryManualFebruary2019.pdf>

<sup>36</sup> The judge's directions on the legal tests that should be applied were not truncated from those included in the Jury Manual, although the overall length of directions in any given trial will vary depending on the complexity of the case and the number of legal issues on which the jury requires to be directed.

## 2.4 The mock jury process

The 64 mock juries took place over eight Saturdays. Four juries took place simultaneously (in separate rooms) in the morning, and another four in the afternoon. The process was as follows:

- Jurors received a short briefing from the researcher responsible for their jury, took the juror affirmation, and then watched the film allocated to their jury.
- Jurors took the standard juror affirmation.<sup>37</sup>
- Jurors watched the trial video.
- The researcher distributed a short self-completion questionnaire (referred to in this report as the ‘pre-deliberation’ questionnaire), recording jurors’ initial views on the appropriate verdict and their level of confidence in those views.<sup>38</sup> The researcher gave any ‘spare’ jurors (in excess of the 12 or 15 required for deliberations) a slightly different questionnaire, which also included questions about the not proven verdict (asked of other jurors after deliberation).<sup>39</sup>
- ‘Spare jurors’ were then sent home and the remaining 12 or 15 jurors were instructed to begin their deliberations. The researcher left the room after starting the audio and video-recording equipment and jurors deliberated for up to 90 minutes.
- Once juries indicated that they were ready to return a verdict, the researcher asked them who spoke for the jury, and whether they had been able to reach a verdict (and, for unanimity conditions, whether this was a verdict on which they were all agreed).
  - If a jury asked to reach a unanimous verdict was unable to do so after 70 minutes of deliberation, they were played a supplementary video direction from the judge. This informed the jury that they could now return a verdict if ten out of 12 or 13 out of 15 jurors agreed on it. If, after a further 20 minutes (that is, a total deliberation time of 90 minutes), the jury was still unable to reach a verdict, the outcome was recorded as ‘hung’.
- Once the verdict had been recorded, the researcher administered another self-completion questionnaire (the ‘post-deliberation’ questionnaire<sup>40</sup>), which covered:
  - Jurors’ individual views on the appropriate verdict, and their reasons for favouring that verdict.

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<sup>37</sup> Jurors in an actual criminal case may either swear an oath or affirm: that is, “swear by Almighty God” or “solemnly, sincerely and truly declare and affirm” that (in either case) they will “well and truly try the accused and give a true verdict according to the evidence”. A decision was taken to use the affirmation throughout to heighten the realism of the experience while avoiding undue complexity.

<sup>38</sup> See Annex E.

<sup>39</sup> See Questionnaire C in Annex E.

<sup>40</sup> See Annex E.

- Whether they had changed their mind during the course of deliberations and their reasons for doing so.
- Their level of confidence in whether the jury's verdict was the right one.
- Their views on their ability to participate in the jury's discussions.
- The influence they felt they had over the jury's decision.
- Their level of satisfaction with the experience of being a juror.
- Their understanding of the not proven verdict.
- Basic demographic information about each juror (gender, age group, working status and highest educational qualification).

## 2.5 The data

Data from the mock juries was collected and triangulated from three main sources.

### 2.5.1 Jury 'metadata'

Information about each jury was recorded on a 'jury record sheet' by the researcher overseeing it.<sup>41</sup> This included: the time the jury began deliberating, the time at which they returned a verdict, what that verdict was, and, for any near unanimity verdicts in the unanimity condition, the size of the majority.

### 2.5.2 Participant (mock juror) questionnaires

Ipsos MORI's specialist teams scanned and edited data from the questionnaires that jurors completed before and after deliberating. Specialist teams also coded data from open-text questions, using a framework developed by the research team following review of a sample of the data. An SPSS (quantitative analysis software) data file was produced for analysis by the research team.

### 2.5.3 Jury deliberations

All deliberations were audio and video-recorded. Audio recordings were professionally transcribed. The research team coded their content thematically with the use of NVivo (qualitative analysis software), using a code frame developed by the team after reviewing a sample of deliberations.

The research team also reviewed the video-recordings of the deliberations using an observation sheet.<sup>42</sup> This was used both to capture the themes discussed during deliberations (as reflected in the NVivo coding), and to record elements of how juries reached their decision (for example, the tone of discussion, levels of participation, and numbers of dominant jurors). To ensure consistency, sheets were completed independently by two members of the research team for each jury.<sup>43</sup>

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<sup>41</sup> See Annex F.

<sup>42</sup> See Annex G.

<sup>43</sup> Any discrepancies between the two were discussed and resolved, involving additional members of the research team where necessary to ensure consistency of approach.

The final data from observation sheets was merged with the jury metadata and questionnaire data for analysis.

#### **2.5.4 Data analysis and presentation**

The study generated both quantitative data (from juror questionnaires and metadata) and qualitative data (for example, about the ways in which not proven was discussed within deliberations). It also captured data at both jury and individual juror level.

Any differences in the quantitative findings presented in the main body of the report are statistically significant (at the 5% level) unless otherwise stated.<sup>44</sup> Further detail about the statistical tests applied is included in Annex H.

### **2.6 Study limitations**

In comparison with many previous mock jury studies, this research was significantly more realistic. In particular:

- It used filmed trials rather than transcripts, and jurors were directed on the legal tests to be applied.
- It included a lengthy group discussion element (some mock jury studies either omit this altogether, or allow very limited time for deliberation).
- Each mock jury included either 12 or 15 people (groups of six to eight are common in mock jury research, which is significantly smaller than the real juries the findings are intended to apply to – see Annex B for further discussion of methods and realism in mock jury research).

All these elements increase the robustness of the research and the confidence that can be placed in its conclusions. However, as with any mock jury research, it is subject to several limitations that must be kept in mind when interpreting the findings.

First, participants knew that they were not acting as jurors in a real trial. The one-hour video simulations were engaging and benefitted from input from legal practitioners to maximise realism, but they inevitably involved a substantially streamlined account of the criminal trial, with none of the periods of delay and disruption that often mark real proceedings. The vast majority of mock jurors appeared to take the proceedings seriously – as indicated by the fact that discussions between jurors who disagreed regularly became animated. However, it is not possible in any mock jury study to control for any impact that the artificial nature of the experience might have had on how they deliberated or which verdict they returned.

Second, sample size is a common issue in jury research and although the study was the largest of its type in the UK, involving almost 1,000 individual jurors, the

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<sup>44</sup> That is, significance tests on differences reported in the text produced P-values of  $\leq 0.05$ , indicating that the probability of such a difference occurring in our sample when there is no actual difference in reality is less than 5%.

total number of juries (64) was still relatively small. As such, it is unlikely that anything other than large differences in verdicts between juries would have been picked up. As discussed in Chapter 3, however, the much larger sample of jurors included in this study means that it is possible to identify significant differences at juror level. Though translation from juror- to jury-level findings is not straightforward, these findings indicate the likelihood of particular features tilting juries in one direction or another.

Third, the findings in this report are based on jurors' responses to two specific trials. As discussed above,<sup>45</sup> the trials in this research were deliberately designed to prompt debate between verdicts, in order to test whether, all else being equal, particular features (number of verdicts, etc.) influenced jurors in one direction or another, and to encourage discussion of the not proven verdict. The fine balance of the trials was therefore appropriate to the specific aims of this study. However, the exact pattern of verdicts returned is unlikely to reflect the pattern of verdicts that would be returned by juries in a wider range of differently balanced cases. Thus, while we can reach informed conclusions from this study on, for example, whether a change in the majority required would incline more jurors towards or away from a specific verdict, we cannot estimate the likely scale of those impacts across a larger number of differently balanced trials.

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<sup>45</sup> Section 2.3.



### 3. What impact do the unique features of the Scottish jury system have on verdict choice?

#### Key findings

- There were a number of statistically significant differences at juror level.
  - **There was an overall tendency for jurors to change from favouring guilty to favouring acquittal** over the course of deliberations. However, most juries (51 of 64) in this study started their deliberations with a majority of jurors favouring acquittal. It is therefore unclear whether this reflects a tendency (noted in other research) for jurors to become more lenient as a result of deliberating, or a tendency for jurors to move towards the majority position (whatever that might be).
  - **When the not proven verdict was available, more individual jurors favoured acquittal**, both before and after deliberating.
  - **Jurors in 15-person juries were less likely to change their minds about the verdict than jurors in 12-person juries.**
  - **Jurors asked to reach a simple majority were more likely to think the verdict should be guilty** (after deliberating) than were those asked to reach a unanimous verdict.
- **As expected, due to the small number of juries in each condition, there were no significant differences at jury level in the proportion of guilty verdicts returned** between juries that had the not proven verdict available and juries that did not, between 12 and 15-person juries, or between juries asked to reach a unanimous verdict and those asked to reach a simple majority.
- **Separate analysis of jurors in the rape and assault trials shows no significant difference in the proportion of rape trial jurors favouring guilty or acquittal verdicts by either the number of verdicts available, or by jury size.** The finding that requiring unanimity increases the proportion of jurors favouring acquittal holds across both types of trial, however.
- **The combination of features most strongly associated with individual jurors favouring a guilty verdict at the end of deliberations was 15-person, simple majority, and two verdicts.** The combination in which jurors were least likely to favour guilty by the end of deliberations was 12-person, unanimity, and three verdicts. Neither of these jury system combinations are currently used in Scotland or in England and Wales, although the first would represent the system in Scotland if the not proven verdict were abolished without any other reforms.

### 3.1 Introduction

A central aim of this research was to understand what effect, if any, the three unique features of the Scottish jury system – three verdicts, 15 jurors, and the requirement that juries reach a simple majority (eight out of 15) before returning a verdict – have on jury decision-making. This chapter discusses findings on the effects of these unique features on verdict choice, at both jury level (verdicts returned by the 64 juries) and individual juror level (individual jurors' views on what the verdict should be, which may differ from the verdict returned by their jury collectively).

### 3.2 Jury versus juror-level findings

As discussed in Chapter 1, this study is the largest mock jury study conducted in the UK to date. However, the total number of juries (64) is still relatively small in statistical terms. This means that, at the jury level, anything other than large differences in the likelihood of a guilty verdict being returned would not be picked up (as differences would need to be large to be statistically significant).

However, we can also examine the individual verdict preferences of all 863 jurors who took part in the jury deliberations, based on their responses to questionnaires completed before and after deliberation. This juror-level analysis has the advantage of a considerably larger sample size, meaning there is a greater likelihood of identifying significant differences by the number of verdicts available, jury size, and majority required.

One disadvantage of this approach is that in real trials jurors do not return verdicts individually – they do so collectively, after deliberation. At the same time, juries' verdicts are the product of individual jurors' views, mediated through the deliberation process and the rules which the jury must apply to reach their collective verdict. In this sample, 30 out of 32 simple majority juries (94%) returned verdicts which were the same as the majority preferences of individual jurors (as indicated in their pre-deliberation questionnaires). Similarly, of the unanimity juries who were able to return a verdict rather than hanging (25 of 32 juries), the choice to convict or acquit could have been accurately predicted from the balance of individual jurors' initial verdict preferences in almost all cases (though not necessarily whether not guilty or not proven would be used as the means of acquittal).<sup>46</sup> In other words, the majority of jury-level verdicts could have been predicted from the pre-deliberation responses of individual jurors.<sup>47</sup> Examining the relationship between individual

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<sup>46</sup> In the unanimity juries, none of the 32 juries would have been able to return a verdict on the basis of the jurors' initial preferences as stated in their pre-deliberation questionnaires. There were no instances in which those initial preferences were unanimous, nor any in which there were only one or two jurors with a different view from the majority position. However, in every instance where a unanimity jury returned a verdict, the decision to convict or acquit (but not necessarily the choice of acquittal verdict) was identical to the preference of a majority of jurors prior to deliberation, aside from one acquittal where the jurors' initial preferences had been split 50:50.

<sup>47</sup> Some support for the predictive value of individual pre-deliberation verdicts can also be found in previous research: Hastie and others, for example, conducted a study involving 69 juries comprised of 12 members. The jurors observed a simulated trial and then completed pre-deliberation questionnaires. The researchers concluded that the most accurate model for

verdict preferences and the different features of the jury system in this study can therefore shed light on how these features might tilt jurors – and by extension, juries – in one direction or another.

However, it is important to keep in mind that the precise effects that any impact on juror-level views will have on jury-level outcomes in any given case cannot be reliably predicted – it will depend on other factors, including the balance of evidence, the initial balance of opinion of the jury, and individual jury dynamics. It is not, therefore, possible to estimate the likely scale of any impact that differences at juror-level would have on jury-level outcomes across a larger number of differently balanced trials. As explained in section 2.3, the trials used in this research were designed to be finely balanced in order to encourage discussion of the not proven verdict. In practice, not all trials will be so finely balanced.

### **3.3 Does jury size, the number of verdicts available, or the majority required make any difference to jury-level verdicts?**

Table 3.1 shows the verdicts returned by all 64 mock juries, broken down by trial type and by each system feature being examined (number of verdicts, jury size, and majority required).<sup>48</sup> Overall, seven juries returned a guilty verdict, 26 returned not guilty, 24 returned not proven, and seven failed to reach a verdict within the 90 minutes allowed for deliberation and were thus recorded as hung.

All seven hung juries had been asked to reach a unanimous verdict, on which all (or almost all)<sup>49</sup> jurors were agreed.<sup>50</sup> The relatively high number of hung juries in this study is likely to reflect both the deliberately finely balanced nature of the trial videos (reasons for which are discussed in section 2.3), and the fact that deliberations were time-limited (to a maximum of 90 minutes). The findings do not, therefore, indicate that juries asked to reach unanimity would be expected to hang with this frequency in reality. Indeed, in England and Wales, where juries are

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predicting final jury level verdicts was a weighted average drawn from individual jurors' initial preferences (which correctly predicted the result in 75% of cases). R Hastie, SD Penrod and N Pennington, *Inside the Jury* (1983) at 63-65. Note that none of these juries applied a simple majority rule, however, and so extrapolation to the Scottish context is unclear. Three different decision rules were applied, each by one-third of the mock juries: 12 votes out of 12, 10 votes out of 12 and eight votes out of 12.

<sup>48</sup> The table also shows the split by the number of verdicts available within trial type, jury size and majority required (since in each case, half the juries were asked to choose between guilty and not guilty, and half between guilty, not guilty and not proven).

<sup>49</sup> As described in Chapter 2, if juries were unable to reach a completely unanimous decision, they were allowed to return a verdict if either 10 out of 12, or 13 out of 15, of them could agree on it.

<sup>50</sup> As noted in Section 1.1 above, one distinctive feature of the Scottish jury system as it stands is that hung juries are impossible: the simple majority decision rule means that a verdict will always be reached.

required to try to reach unanimity,<sup>51</sup> the proportion of juries unable to return a verdict is typically under 1%.<sup>52</sup>

The pattern of verdicts reached in the two different trials shown to mock jurors was very similar. Across rape trial juries, there were four guilty verdicts, 12 not guilty verdicts, 12 not proven verdicts, and four hung juries. Across assault trial juries, there were three guilty verdicts, 14 not guilty verdicts, 12 not proven verdicts and three hung juries.

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<sup>51</sup> Juries must attempt to reach unanimity but ultimately can return a verdict that 10 out of 12 of their members agree on.

<sup>52</sup> J Chalmers, "Jury majority, size and verdicts", in J Chalmers, F Leverick and A Shaw (eds), *Post-Corroborated Safeguards Review: Report of the Academic Expert Group* (2014) 140 at 151-152.

Table 3.1 – Verdicts returned by jury features

	Guilty	Not guilty	Not proven	Hung	Number of juries
<b>ALL 64 juries</b>	<b>7</b>	<b>26</b>	<b>24</b>	<b>7</b>	<b>64</b>
<b>Trial type</b>					
<b>Rape trial (All)</b>	<b>4</b>	<b>12</b>	<b>12</b>	<b>4</b>	<b>32</b>
Rape trial, two verdicts	1	12	NA	3	16
Rape trial, three verdicts	3	0	12	1	16
<b>Assault trial (All)</b>	<b>3</b>	<b>14</b>	<b>12</b>	<b>3</b>	<b>32</b>
Assault trial, two verdicts	2	12	NA	2	16
Assault trial, three verdicts	1	2	12	1	16
<b>Number of verdicts</b>					
<b>Two verdicts (All)</b>	<b>3</b>	<b>24</b>	<b>NA</b>	<b>5</b>	<b>32</b>
<b>Three verdicts (All)</b>	<b>4</b>	<b>2</b>	<b>24</b>	<b>2</b>	<b>32</b>
<b>Number of jurors</b>					
<b>12-person juries (All)</b>	<b>2</b>	<b>13</b>	<b>15</b>	<b>2</b>	<b>32</b>
12-person, two verdicts	1	13	NA	2	16
12-person, three verdicts	1	0	15	0	16
<b>15-person juries (All)</b>	<b>5</b>	<b>13</b>	<b>9</b>	<b>5</b>	<b>32</b>
15-person, two verdicts	2	11	NA	3	16
15-person, three verdicts	3	2	9	2	16
<b>Majority type</b>					
<b>Simple majority (All)</b>	<b>6</b>	<b>14</b>	<b>12</b>	<b>NA</b>	<b>32</b>
Simple majority, two verdicts	3	13	NA	NA	16
Simple majority, three verdicts	3	1	12	NA	16
<b>Unanimous (All)</b>	<b>1</b>	<b>12</b>	<b>12</b>	<b>7</b>	<b>32</b>
Unanimous, two verdicts	0	11	NA	5	16
Unanimous, three verdicts	1	1	12	2	16

While juries asked to choose between three verdicts were no more or less likely to return a guilty verdict than those with two verdicts available, when the not proven

verdict was an option it was almost always chosen as the means of acquittal. Of the 32 juries asked to choose between three verdicts, 26 acquitted, and 24 of those 26 returned a verdict of not proven.

This pattern of acquittal verdicts is quite different to the actual pattern of acquittals returned in Scottish courts. In 2017-18, only 17% of all acquittal verdicts in the Scottish courts were not proven verdicts. However, the proportion of not proven verdicts returned was higher in more serious cases: for example, not proven accounted for 26% of all acquittals in homicide cases and 35% of all acquittals in rape and attempted rape cases.<sup>53</sup> The 17% figure above includes both jury (solemn) and non-jury (summary) trials, while homicide and rape cases would all have been determined by a jury.<sup>54</sup> The relatively low level of guilty verdicts returned by mock juries in this study, and the high proportion of acquittals that were not proven (compared with statistics for actual criminal trials in Scotland), is again likely to reflect the fact that the evidence in both trials was deliberately finely balanced.

Overall, then, the verdicts returned by the 64 mock juries in this study do not show that any of the three unique features of the Scottish system have an effect on the likelihood of juries convicting an accused person. As discussed, given the sample size, this is not surprising. However, the findings do suggest that – at least where the evidence is finely balanced – juries prefer to acquit via not proven rather than not guilty.

As discussed in section 3.2, the fact that there were no significant differences by any of the features examined at jury level is not surprising given that the number of juries (64) is relatively small in statistical terms. In the next section, we examine whether there were any differences across the much bigger sample of 863 individual jurors who deliberated in those juries.

### 3.4 Does jury size, the number of verdicts available, or the majority required make any difference to juror-level verdicts?

#### 3.4.1 Overall patterns in the verdicts favoured by individual jurors

Before deliberating with their peers, 33% of jurors thought the jury should return a verdict of guilty, 42% favoured not guilty and 25% not proven. After deliberating, the proportion favouring a guilty verdict fell to 26%, not guilty remained the same at 42%, and the proportion favouring not proven increased to 32%. **This indicates an overall tendency for individual jurors to shift from favouring guilty before deliberating to favouring acquittal afterwards.**

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<sup>53</sup> Scottish Government, *Criminal Proceedings in Scotland, 2017-18* (2019) 53. Figures on the use of the not proven verdict in all cases prosecuted as assault (the other trial type used in this research) are difficult to discern as assault is included in three different categories used in the data.

<sup>54</sup> In answer to a question asked in the Scottish Parliament, it was stated that, in 2016-17, 31% of acquittal verdicts in solemn cases (heard by a judge and a jury) were not proven. The figures for the two previous years were 28% (2015-16) and 30% (2014-15). See Scottish Parliament Question S5W-18904.

The explanation for this shift to acquittal is not straightforward. As 51 of the 64 juries in this research started out with a majority favouring acquittal, this pattern might reflect a tendency for jurors to move towards the majority position (in this case, acquittal) as a result of deliberation. However, there is a body of existing research that suggests that deliberating with other jurors tends to create a 'leniency bias', whereby jurors are more likely to shift position from guilty to acquittal than from acquittal to guilty.<sup>55</sup> The results might reflect this tendency.

### 3.4.2 Does the number of verdicts available have any impact on the verdicts favoured by individual jurors?

**Individual jurors were more likely to support an acquittal and less likely to support a guilty verdict when the not proven verdict was available.** 28% of jurors who had three verdicts available to them thought the verdict should be guilty before deliberating, compared with 38% of jurors asked to choose between guilty and not guilty only. Post-deliberation, 22% of three-verdict jurors thought the verdict should be guilty, compared with 31% of two-verdict jurors. The fact that three-verdict jurors were more likely to favour acquittal both before and after deliberating suggests that the availability of the not proven verdict has an effect on jurors' verdict preferences independent of any impact of deliberation.

This finding broadly reflects existing research (summarised in Chapter 1), which suggests – albeit not emphatically given the methodological limitations and relative paucity of such studies to date – that the availability of a not proven verdict may be associated with individual jurors being less likely to favour conviction.

The pattern of acquittal verdicts favoured by jurors in three-verdict juries also reinforces the jury-level finding, above (section 3.3), that for these trials jurors had a clear preference for acquitting via not proven. 79% of jurors asked to choose between three verdicts favoured acquittal after deliberating. This 79% splits into 65% who thought the verdict should be not proven, and 14% who thought it should be not guilty.

### 3.4.3 Does jury size have any impact on the verdicts favoured by individual jurors?

Unsurprisingly (since they had yet to discuss the trial with each other), jury size did not have any impact on the verdicts favoured by individual jurors before deliberating. However, after deliberating as a group, **jurors in 12-person juries were less likely to think the verdict should be guilty than were jurors in 15-person juries (21% vs 30%). This is a result of jurors in 12-person juries being more likely to shift towards acquittal during deliberation than those in 15-person juries.**<sup>56</sup>

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<sup>55</sup> See e.g. the meta-analysis in RJ MacCoun and NL Kerr, "Asymmetric influence in mock jury deliberation: Jurors' bias for leniency" (1988) 54 *Journal of Personality and Social Psychology* 21.

<sup>56</sup> In 12-person juries, 69% of jurors favoured acquittal pre-deliberation, compared to 79% post-deliberation (a shift towards acquittal of ten percentage points). In 15-person juries 66% of jurors favoured acquittal pre-deliberation compared to 70% post-deliberation (a shift of only four percentage points) (Tables 3.2 and 3.3).



However, this does not necessarily indicate that 15-person juries would be more likely to return guilty verdicts across a larger number of differently balanced trials. Rather, it may reflect the fact that, where a 15-person jury is split, on average more people would need to shift their position to change the outcome. In 15-person juries, there may therefore be less motivation for those in a substantial minority (which, in this study, was usually those who favoured guilty) to change their individual position in order to bring deliberations to a close.

#### **3.4.4 Does the majority required have any impact on the verdicts favoured by individual jurors?**

The majority required did not have any impact on the verdicts preferred by individual jurors prior to deliberating. Again, this is unsurprising, since at that point jurors were unaware of how close or far away their jury might be from reaching the majority required to return a verdict. However, after deliberating as a group, **jurors asked to reach a simple majority decision were more likely to think the verdict should be guilty than were those asked to reach a unanimous decision (32% vs 20%).** Again, this occurred as a result of jurors in the unanimity condition changing their view to the majority opinion (which was, in most juries, to acquit) over the course of deliberating. Unsurprisingly, this shift to the majority view was more likely to happen when jurors had to agree on a unanimous verdict rather than returning a simple majority verdict.<sup>57</sup>

In order to return a verdict, juries in a unanimity condition have to persuade jurors who support a minority position to shift their view, while a simple majority jury can return a verdict even if those in the minority do not shift at all. However, further analysis indicates that jurors may be less willing to move from acquittal to guilty when the initial balance of opinion is the other way around. In the unanimity condition, six juries started out with a majority for guilty, but only one of these actually went on to return a guilty verdict – the other five hung. In contrast, of the 25 juries that started with a majority in favour of acquittal, 24 went on to acquit, and only one hung.<sup>58</sup>

These findings also raise questions over the extent to which jurors asked to reach unanimity shift in order to facilitate a verdict, rather than because they have genuinely been convinced by the opposing arguments. Of course, it is important to remember that these findings are based on simulations rather than real juries. It is possible that, in a real trial, the inclination of jurors to shift their personal view to facilitate a verdict would differ.

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<sup>57</sup> In simple majority juries, the percentage of jurors favouring acquittal was exactly the same pre- and post-deliberation (67%), whereas in unanimity juries 66% of jurors favoured acquittal pre-deliberation compared to 80% post-deliberation (a shift of 12 percentage points) (Tables 3.2 and 3.3).

<sup>58</sup> One unanimity jury started off with an even split between jurors favouring guilty (six) and acquittal (six) – this jury acquitted at the end of deliberations.



Table 3.2 – Percentage of individual jurors personally favouring each verdict, PRE-deliberation by experimental condition (all jurors who deliberated)

	Conviction	Acquittal			
	Guilty	Acquittal (all forms)	Not guilty	Not proven	Base (jurors)
<b>All jurors who deliberated</b>	<b>33%</b>	<b>67%</b>	<b>42%</b>	<b>25%</b>	<b>863</b>
<b>Trial type</b>					
<b>Rape trial (All)</b>	<b>40%</b>	<b>59%</b>	<b>36%</b>	<b>23%</b>	<b>431</b>
Rape trial, two verdicts	44%	55%	55%	NA	216
Rape trial, three verdicts	35%	65%	18%	47%	215
<b>Assault trial (All)</b>	<b>26%</b>	<b>74%</b>	<b>48%</b>	<b>26%</b>	<b>432</b>
Assault trial, two verdicts	32%	68%	68%	NA	216
Assault trial, three verdicts	20%	81%	29%	52%	216
<b>Number of verdicts</b>					
<b>Two verdicts (All)</b>	<b>38%</b>	<b>62%</b>	<b>62%</b>	<b>NA</b>	<b>432</b>
<b>Three verdicts (All)</b>	<b>28%</b>	<b>73%</b>	<b>23%</b>	<b>50%</b>	<b>431</b>
<b>Number of jurors</b>					
<b>12-person juries (All)</b>	<b>31%</b>	<b>69%</b>	<b>43%</b>	<b>26%</b>	<b>383</b>
12-person, two verdicts	36%	64%	64%	NA	192
12-person, three verdicts	26%	74%	23%	51%	191
<b>15-person juries (All)</b>	<b>34%</b>	<b>66%</b>	<b>42%</b>	<b>24%</b>	<b>480</b>
15-person, two verdicts	40%	60%	60%	NA	240
15-person, three verdicts	29%	71%	23%	48%	240
<b>Majority type</b>					
<b>Simple majority (All)</b>	<b>32%</b>	<b>67%</b>	<b>43%</b>	<b>24%</b>	<b>432</b>
Simple majority, two verdicts	37%	63%	63%	NA	216
Simple majority, three verdicts	28%	72%	23%	49%	216
<b>Unanimous (All)</b>	<b>33%</b>	<b>66%</b>	<b>41%</b>	<b>25%</b>	<b>431</b>
Unanimous, two verdicts	40%	60%	60%	NA	216
Unanimous, three verdicts	27%	73%	22%	51%	215

Table 3.3 – Percentage of individual jurors personally favouring each verdict, POST-deliberation by experimental condition (all jurors who deliberated)

	Conviction	Acquittal			
	Guilty	Acquittal (all forms)	Not guilty	Not proven	Base (jurors)
<b>All jurors who deliberated</b>	<b>26%</b>	<b>74%</b>	<b>42%</b>	<b>32%</b>	<b>863</b>
<b>Trial type</b>					
<b>Rape trial (All)</b>	<b>33%</b>	<b>67%</b>	<b>36%</b>	<b>31%</b>	<b>431</b>
Rape trial, two verdicts	37%	63%	63%	NA	216
Rape trial, three verdicts	30%	70%	9%	61%	215
<b>Assault trial (All)</b>	<b>19%</b>	<b>81%</b>	<b>47%</b>	<b>34%</b>	<b>432</b>
Assault trial, two verdicts	25%	75%	75%	NA	216
Assault trial, three verdicts	13%	87%	19%	68%	216
<b>Number of verdicts</b>					
<b>Two verdicts (All)</b>	<b>31%</b>	<b>69%</b>	<b>69%</b>	<b>NA</b>	<b>432</b>
<b>Three verdicts (All)</b>	<b>22%</b>	<b>79%</b>	<b>14%</b>	<b>65%</b>	<b>431</b>
<b>Number of jurors</b>					
<b>12-person juries (All)</b>	<b>21%</b>	<b>79%</b>	<b>40%</b>	<b>39%</b>	<b>383</b>
12-person, two verdicts	28%	72%	72%	NA	192
12-person, three verdicts	15%	85%	7%	78%	191
<b>15-person juries (All)</b>	<b>30%</b>	<b>70%</b>	<b>43%</b>	<b>27%</b>	<b>480</b>
15-person, two verdicts	33%	67%	67%	NA	240
15-person, three verdicts	27%	73%	19%	54%	240
<b>Majority type</b>					
<b>Simple majority (All)</b>	<b>32%</b>	<b>67%</b>	<b>39%</b>	<b>28%</b>	<b>432</b>
Simple majority, two verdicts	36%	64%	64%	NA	216
Simple majority, three verdicts	29%	71%	14%	57%	216
<b>Unanimous (All)</b>	<b>20%</b>	<b>80%</b>	<b>44%</b>	<b>36%</b>	<b>431</b>
Unanimous, two verdicts	25%	75%	75%	NA	216
Unanimous, three verdicts	14%	85%	13%	72%	215

### **3.4.5 Was the impact of the Scottish system's unique features the same in the rape and assault trial?**

This research included two types of trials – a rape trial and an assault trial.<sup>59</sup> Jurors in the 32 rape trial juries were more likely to think the verdict should be guilty than were jurors in the 32 assault trial juries, both before deliberation (40% vs 26%) and after (33% vs 19%). Considering these differences, the analysis above of juror views on the verdict was repeated separately for each type of trial.

Differences between jurors asked to reach a unanimous verdict and those asked to reach a simple majority were apparent across both trial types. In each case, those asked to reach a simple majority were more likely to favour a guilty verdict after deliberating than those asked to reach unanimity.

Both rape and assault trial jurors were less likely to favour a guilty verdict after deliberating when the not proven verdict was available than when it was not,<sup>60</sup> but this difference between the two-verdict and three-verdict conditions was only statistically significant for the assault trial. Similarly, in both trials, jurors in 15-person juries were more likely than those in 12-person juries to favour a guilty verdict after deliberating,<sup>61</sup> but again this difference was only statistically significant for the assault trial.

Findings for each individual trial type are based on around 430 jurors, compared with the full sample of 863 jurors. This means that bigger differences are required to reach statistical significance when analysing findings for each trial type separately.

On the basis of this data it is not possible to conclude that availability of the not proven verdict or jury size made a significant difference to juror verdict preferences in the rape trial. However, the finding that requiring unanimity increases the proportion of jurors favouring acquittal holds across both types of trial.

### **3.4.6 How do jury size, number of verdicts, and the majority required interact with each other?**

Our analysis indicates that each unique feature of the Scottish jury system was independently and significantly related to the likelihood of individual jurors favouring a guilty verdict, in the ways described above.<sup>62</sup> However, these features are also

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<sup>59</sup> See section 2.3.

<sup>60</sup> The proportions who thought the verdict should be guilty, after deliberating, were: Rape trial – 30% (three-verdict) vs 37% (two-verdict); Assault trial – 13% (three-verdict) vs 25% (two-verdict).

<sup>61</sup> The proportions who thought the verdict should be guilty, after deliberating, were: Rape trial – 36% (15-person) vs 29% (12-person); Assault trial – 23% (15-person) vs 14% (12-person).

<sup>62</sup> This was confirmed via logistic regression, which examines whether different features are significantly associated with an outcome – in this case verdict – even after controlling for possible inter-relationships between these features. Each of the three unique features (number of verdicts, jury size and majority required) were included in the model, alongside trial type (rape vs assault) and individual jurors' demographic characteristics (gender, age group, education level). This confirms that the number of verdicts is significantly and independently associated with the likelihood of individual jurors favouring a guilty verdict both pre- and post-deliberation, while jury size and majority required are significantly and independently associated with likelihood of favouring a guilty verdict post-deliberation (but not pre-deliberation).

likely to interact with each other. Table 3.4 shows differences in the proportions of jurors favouring a guilty verdict before and after deliberating, within each of the eight possible combinations of the three features. Condition F in Table 3.4 is the jury system presently used in Scotland (15-person, simple majority, three verdicts) and condition B is the jury system used in England and Wales (12-person, unanimity, two verdicts).

Of the three features, the majority required has the biggest impact on the likelihood of individual jurors shifting towards acquittal – jurors were most likely to change from guilty to acquittal when required to reach a unanimous verdict. Jurors were less likely to think the verdict should be guilty before deliberating when the not proven verdict was available. However, the impact of the number of verdicts available was moderated during deliberations by the majority required. Regardless of the number of verdicts available, if the jury had to reach a unanimous verdict, jurors were more likely to shift to support acquittal.

The combination of features most likely to result in individual jurors favouring a guilty verdict after deliberating was 15-jurors, simple majority, and two verdicts (condition H in Table 3.4, where 37% favoured a guilty verdict). The combination least likely to result in individual jurors favouring a guilty verdict after deliberating was 12-jurors, unanimity, and three verdicts (condition A in Table 3.4, where just 3% favoured a guilty verdict). It should again be emphasised that these figures are based on two deliberately finely-balanced trials which are not representative of the full range of cases which come before the courts. Neither of these combinations represents the jury system currently used in Scotland or in England and Wales, although the first would be the system in Scotland if the not proven verdict were removed with no other changes being made.

Table 3.4 – Proportion of individual jurors favouring a guilty verdict pre- and post-deliberation by combination of features

Condition	Jury size (15 or 12)	Majority required (simple majority or unanimous)	Number of verdicts (3 or 2)	Pre-deliberation % guilty	Post-deliberation % guilty	Difference (post minus pre)	Base ( <i>jurors</i> )
A	12	U	3	23%	3%	-20	95
B	12	U	2	39%	21%	-18	96
C	15	U	3	30%	23%	-7	120
D	12	SM	3	29%	27%	-2	96
E	15	U	2	41%	29%	-12	120
F	15	SM	3	28%	30%	3	120
G	12	SM	2	34%	34%	0	96
H	15	SM	2	38%	37%	-2	120

## 4 What impact do the unique features of the Scottish jury system have on how juries reach decisions?

### Key findings

- **Juries asked to reach a unanimous verdict deliberated for substantially longer** than those only required to reach a simple majority. There were no statistically significant differences in the length of time taken to reach a verdict between 12-person and 15-person juries or between juries which had two or three verdicts available.
- **There was no statistically significant variation in the mean number of evidential issues raised within jury deliberations** by jury size, the number of verdicts available, or the majority required.
- **In general, there was no statistically significant variation in whether or not juries discussed specific legal issues** between the three features examined. The only exception to this was that juries asked to choose between two verdicts (guilty and not guilty) were more likely than those who also had not proven as an option to discuss the meaning of reasonable doubt. Jurors that discussed the meaning of the reasonable doubt standard of proof, however, often defined this somewhat differently to the definition given by the judge.
- **Jurors sometimes struggled to recollect legal tests accurately**, although this did not vary with jury size, the number of verdicts available, or the majority required. Other legal misunderstandings that sometimes arose during deliberations included a belief that the accused is required to prove his innocence and a belief that self-defence is not a legitimate defence.
- **15-person juries were associated with somewhat lower levels of juror participation than 12-person juries across a number of measures.** Jurors in 15-person juries were more likely to be seen wanting to contribute but being unable to do so than those in 12-person juries. 15-person juries also included both more 'dominant' and more 'minimally contributing' jurors than 12-person juries. Jurors in 15-person juries (compared with 12-person juries) and in simple majority juries (compared with unanimity juries) felt they had less influence on the collective verdict outcome.

### 4.1 Introduction

Chapter 3 indicated that each of the three unique features of the Scottish jury system do appear to incline jurors in particular directions in terms of their verdict choice. But what impact do they have on how jurors make those choices? In other words, what effect, if any, do they have on the collective process of deliberation? This chapter examines this question, drawing primarily on analysis of the recorded

jury discussions (which examined factors including: length of discussion, scope of discussion, observed level of juror participation, and tone). It also draws on jurors' own perceptions of the deliberation process, based on their responses in the post-deliberation questionnaire.<sup>63</sup> Our analysis focuses particularly on whether there is any evidence that the different features of interest – number of verdicts, jury size and majority required – may be associated with variations in the *quality* of jury deliberation and decision-making.

## 4.2 Length and scope of deliberations

The relationship between length and quality of deliberation is not clear cut. Longer deliberations might reflect repetitive discussion or inefficiencies in decision-making. Alternatively, they might be indicative of more and better substantive discussion.

In our study, juries were able to deliberate for up to 90 minutes before either returning a verdict or hanging (where a jury was required to reach near unanimity but failed to do so). On average, juries returned a verdict after 45 minutes (37 minutes for the assault trial and 54 for the rape trial).

There were no statistically significant differences in the length of time taken to reach a verdict between juries asked to choose between two and three verdicts, or between 12 and 15-person juries.<sup>64</sup> The lack of difference in deliberation time by jury size contrasts with a meta-analysis of existing jury research, which suggests that, in general, larger juries tend to deliberate for longer.<sup>65</sup> However, as discussed in Chapter 1, there is no existing research comparing 12 and 15-person juries specifically (comparisons tend to be between 12-person juries and smaller juries).

Jurors asked to reach a unanimous verdict did take substantially longer over deliberations than those required to reach a simple majority – an average of 54 minutes, compared with 37 minutes. However, this did not appear to be associated with unanimity juries having more wide-ranging discussions, at least in terms of the number of issues discussed. Each jury's deliberations were coded to record whether or not there was discussion of different aspects of the evidence (using an agreed coding frame<sup>66</sup>). We found no statistically significant difference in the mean number of evidential issues raised between unanimity juries and simple majority juries.<sup>67</sup>

We reviewed the 10 unanimity juries that deliberated for the longest period (all for 70 minutes or longer) to see if this provided any further insight into the reasons for, or nature of, these longer deliberations. We were unable, however, to discern any clear pattern. Sometimes these lengthy deliberations were relatively disorganised; sometimes they reflected a clear and entrenched difference in position from the

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<sup>63</sup> See Annex E.

<sup>64</sup> See Annex J, Table J.1.

<sup>65</sup> MJ Saks and MW Marti, "A meta-analysis of the effects of jury size" (1997) 21 Law and Human Behavior 451 at 458-459. However, only two of the studies which Saks and Marti reviewed reported data on this point.

<sup>66</sup> Section 2.5.3. See Annex G for further details.

<sup>67</sup> Neither were there any significant differences in the mean number of evidential issues raised between two-verdict and three-verdict juries or between 12-person and 15-person juries.

outset between different groups of jurors. When unanimity juries did contain strong differences of opinion, jurors sometimes became frustrated at being required to deliberate for longer when they believed that no consensus could be reached. In other long deliberations, there was a gradual process of jurors changing their position until they were able to return a verdict.

### **4.3 Discussion of legal tests and issues**

In addition to coding the number of substantive aspects of the evidence discussed, we also recorded whether or not key legal issues mentioned in the judge's closing directions to the jury were raised during deliberations. Specifically, we recorded whether there was:

- Any mention of (a) either the standard of proof or the meaning of reasonable doubt and (b) whether the evidence was believed to have met that standard of proof (beyond reasonable doubt).
- Any mention of (a) the meaning of corroboration and (b) whether the evidence was believed to provide corroboration for the complainer's account.
- In the rape trial only, any reference to each of the two legal tests for rape described in the judge's directions, namely (a) whether the evidence suggested the complainer had consented or not, and (b) whether the accused had reasonable belief in her consent.
- In the assault trial only, any reference to (a) the general plausibility of the self-defence argument (being put forward as a special defence) and (b) each of the three individual tests of self-defence, namely reasonable belief in imminent danger of attack, violence as a last resort, and use of no more than reasonable force to stop an attack.<sup>68</sup>

(For brief definitions of these terms, see the 'key terms' section at the start of this report).

There was no statistically significant variation in whether or not juries discussed these legal issues by the number of verdicts available, jury size, or the majority required, with one exception: juries asked to choose between two verdicts were more likely than juries asked to choose between three verdicts to discuss the meaning of the reasonable doubt standard (but not whether or not this threshold had been reached).

#### **4.3.1 Reasonable doubt**

It is not obvious from the content of discussions about reasonable doubt why juries with only two verdict options should have been more likely to discuss its meaning. However, what is apparent is that where juries did discuss this, the definitions they reached were often more demanding than the threshold indicated by the judge.

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<sup>68</sup> All three of these circumstances must exist for the defence to succeed, but where the defence is raised the burden of proof is on the prosecution to disprove the defence. If the prosecution disproves any one of these three circumstances beyond reasonable doubt, the jury cannot hold that the accused acted in self-defence.



We found no examples of jurors referring directly to the definition of ‘beyond reasonable doubt’ provided by the judge (taken from the *Jury Manual*), which states:

“...the Crown must establish guilt beyond reasonable doubt. That’s a doubt, arising from the evidence, based on reason, not on sympathy or prejudice, or on some fanciful doubt or theoretical speculation. It’s the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty, but it’s more than a suspicion of guilt, and more than a probability of guilt. This doesn’t mean that every fact has to be proved beyond reasonable doubt. What it means is that, looking at the evidence as a whole, you’ve to be satisfied of the guilt of the accused beyond reasonable doubt.”<sup>69</sup>

While there were occasional references to the idea that proof beyond reasonable doubt is something less than complete certainty, there were repeated examples of other jurors referring to the perceived need to be “100%” confident or similar, which appears to run contrary to the judge’s direction that proof beyond reasonable doubt “is less than certainty”:

*“You need to believe 100% both those (prosecution) witnesses”*

(Juror, Assault trial / three-verdict / 12-person / unanimity)

*“If you’re 99 and three-quarters sure, you’ve got a quarter, you’ve got to go with that quarter.”*

(Juror, Assault trial / two-verdict / 15-person / unanimity)

Thus, the finding that jurors in two-verdict juries were more likely to discuss the meaning of reasonable doubt does not necessarily indicate a better understanding or application of the standard of proof.

#### **4.3.2 Corroboration**

In Scots law, corroboration is required in criminal cases. Mock jurors were directed on this based on the guidance used by judges in directing juries in real criminal trials. All jurors were first told:

“I must tell you about corroboration. The law lays down that nobody can be convicted on the evidence of one witness alone, no matter how strong that evidence may be. There must be evidence from at least two separate sources which you accept and which taken together point to the guilt of the accused. There are two essential matters that must be proved by corroborated evidence. These are that the crime charged was committed, and that the accused was responsible for committing it.”

They were then told which facts needed to be proved by corroborated evidence (which varied between the two trials – assault and rape).

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<sup>69</sup> Judicial Institute for Scotland, *Jury Manual* (2019) 5.15.

In general, jurors appeared to have fewer difficulties understanding the corroboration requirement than the standard of proof. However, there were occasional (erroneous) contributions in rape trial deliberations suggesting that the doctor's forensic evidence would have to unequivocally indicate rape before the jury could convict.<sup>70</sup> We identified six rape trial juries (all of which ultimately returned verdicts of acquittal) in which jurors appeared to suggest this. In three of these, that view was expressly challenged; in a fourth it was not directly challenged but other jurors clearly took a different view; while in the remaining two juries the conversation simply moved on without challenge. Jurors who challenged this view suggested it was unrealistic to demand such a high standard of evidence. For example:

*First Juror: "To me the doctor is the key person and the evidence she gave does not convict him."*

*Second Juror: "But, I don't think... I would be amazed if there is a crime that happens anywhere in the world, that physical evidence is provided for, that the defence can't turn round and say, 'but could something else not have caused that injury?' I don't think there's any injury that you can't say that for."*

(Rape trial / three-verdict / 12-person / simple majority)

### 4.3.3 Trial-specific legal tests

In all types of Scots criminal cases, juries should be convinced that the relevant legal tests around reasonable doubt and corroboration have been met in order to convict. In addition, given this study's focus on rape and assault, our jurors were also required to apply legal tests linked to those specific offences.

In the rape trial, jurors were required to assess whether the evidence suggested the complainer had consented, and whether it suggested the accused had a reasonable belief in her consent. The deliberations revealed considerable debate on the former, some of which reflected differing social norms about what would constitute evidence of free agreement to sexual intercourse.<sup>71</sup> However, the extent or nature of this debate did not vary between two-verdict and three-verdict juries, 12-person and 15-person juries, or between unanimity and simple majority juries. Discussion typically focused on the notion that the complainer had not suffered extensive injury or had not done enough to physically resist the accused (having said in her evidence that she had tried to push the accused off but he was too heavy) or on the fact she had not called for help (no evidence was presented to indicate whether or not there was any person who might have been able to hear such a call).<sup>72</sup> Many jurors said they understood a "freeze" reaction (a term used repeatedly) to be common among rape victims, while others insisted this was not how they would have reacted.<sup>73</sup> This is illustrated by the following exchange:

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<sup>70</sup> For a summary of the content of the trial, see Annex D.

<sup>71</sup> "Free agreement" is the legal definition of consent in sexual offence cases: see Sexual Offences (Scotland) Act 2009 s 12. The jurors were told this by the trial judge.

<sup>72</sup> For a summary of the content of the trial, see Annex D.

<sup>73</sup> Where, in a jury trial for a sexual offence, it is suggested that the sexual activity took place without physical resistance on the part of the complainer, the judge must normally advise the jury

*First juror: "So, think of it this way, think of it this way. Imagine a Saturday night and somebody is out on the town and some people decide to try and assault them. Okay, some people might fight back, some people literally can live in a bubble and don't do anything about it because they're in shock and they can't fight back. The same could apply in that case."*

*Second juror: "Well, I'm just saying this is how I'm feeling, I'm not saying I'm right, but you're asking my opinion. I'm just saying, if you're being attacked and it's a serious assault...then to me you would scratch, you would scream, you would try and do anything possible to get him off."*

(Rape trial / three-verdict / 12-person / simple majority)

In the assault trial, jurors were required to consider the legal tests for self-defence. These tests were not always mentioned (of the 32 assault trial juries, 13 did not specifically reference all three of the tests<sup>74</sup>). Moreover, even when they were referenced, jurors often struggled to recollect each element clearly. In one jury, jurors suggested it would have been helpful to have been directed on self-defence before the evidence had been led, rather than after:

*First juror: "See if the judge had said that at the beginning, then you would be looking out for this wouldn't you, as opposed to saying at the end, what did he actually say? If he said to you 'self-defence means you need to be convinced it was a last resort and it was their way of doing it and it was a minimum use of force' and you can look..."*

*Second juror: "I think we all pretty much agree with that".*

(Assault trial / three-verdict / 15-person / simple majority)

However, there was no difference in the likelihood of the self-defence tests being discussed by any of the features of the jury system examined in this research (number of verdicts available, jury size, or majority required).

#### **4.3.4 Supporting juror understanding**

Overall, then, these findings suggest that the number of verdicts, jury size, and majority required have no clear impact on the extent or accuracy of jury discussion of legal issues. However, they do raise important questions generally about how to support jurors' understanding of those legal issues.

This latter point is also supported by analysis of the frequency with which legal misunderstandings occurred (and were or were not corrected) within the deliberations. In addition to issues around interpreting the standard of proof and corroboration, discussed above, the researchers also identified two further potential

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that there can be good reasons why someone against whom a sexual offence is committed might not physically resist and that the absence of such resistance does not necessarily indicate that an allegation is false: Criminal Procedure (Scotland) Act 1995 s 288DB, as inserted by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 s 6. This direction was included in the judge's directions to the jury in the rape trial simulation.

<sup>74</sup> Though all three assault trial juries that convicted referred to all three tests.

legal misunderstandings that were articulated on multiple occasions across the 64 juries.<sup>75</sup> These were:

- *A belief that the accused was required to prove his innocence.* This was directly contradicted in the judge's directions, which stated, "throughout the trial every accused is presumed innocent unless proved guilty. The accused is not required to prove his innocence." Nonetheless, this belief was expressed in 14 jury deliberations, though it was challenged, with varying degrees of effectiveness, in eight of these.
- *A belief that self-defence did not operate as a defence to assault* (that is, that the accused in the assault trial was automatically guilty simply because he had stabbed the complainer). This belief was expressed in 14 assault trial deliberations – for example, "*he has actually admitted that he stabbed him, so he's guilty*" – and was challenged in 10 of these.<sup>76</sup>

There was no statistically significant variation in the frequency with which these misunderstandings either arose or were challenged by other jurors between two-verdict and three-verdict juries, 12-person and 15-person juries, or unanimity and simple majority juries. Moreover, while we cannot know whether such misunderstandings influenced individual jurors' views, there were no cases where the discussion and verdict expressly proceeded on the basis of such a legal misunderstanding. However, the fact that jurors struggled to remember legal tests and that legal misunderstandings arose relatively frequently across the 64 juries suggests a need to consider whether jurors require additional guidance to aid their discussion.

Another strand of this research involved an extensive evidence review on ways of improving communication with juries.<sup>77</sup> This found that written directions and structured decision aids can be effective in improving memory and/or understanding. Written directions involve giving jurors a written copy of the judge's directions in the case. There is a substantial body of evidence to suggest that this helps jurors to remember and understand legal tests. Such improvements in understanding tend, however, to be limited to improvements in simple comprehension. In other words, they help jurors to remember and accurately re-state legal directions. Structured decision aids (sometimes called 'routes to verdict') are documents that contain a series of primarily factual questions – which might be presented as written questions or in diagrammatic or flowchart form – that gradually lead jurors to a legally justified verdict. Evidence suggests that these are particularly effective at improving 'applied' comprehension – jurors' ability to

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<sup>75</sup> This excludes misunderstandings relating to the not proven verdict. Juror understanding of the not proven verdict is considered separately in Chapter 5.

<sup>76</sup> Note that it was not always clear whether particular statements reflect actual misunderstandings, or rather a poor articulation of a legitimate position. For example, with respect to statements that self-defence did not operate as a legitimate defence, it may be that in some cases jurors accepted the validity of the self-defence argument in principle, but viewed the degree of violence such that they felt the incident could not be considered self-defence – and were therefore attempting to short-circuit the debate since they were already convinced it was not self-defence.

<sup>77</sup> J Chalmers and F Leverick, [\*Methods of Conveying Information to Jurors: An Evidence Review\*](#) (2018).

correctly apply legal tests to the evidence. The evidence review found that the use of structured decision aids is well-established in other jurisdictions, including England and Wales, Canada, New Zealand and some Australian states and territories.

#### **4.4 Levels of individual juror participation**

Juries are intended to proceed on the basis of discussion between jurors about the evidence they have heard. The ideal is that all members of a jury are able to contribute freely and make their views known. The research team recorded various measures of juror participation in deliberations,<sup>78</sup> including:

- How often individual jurors were observed apparently wanting to contribute but being unable to do so.
- The number of ‘dominant jurors’ in each jury (defined as “any juror who contributes very obviously more substantially than most other jurors”).
- The number of ‘minimally contributing jurors’ in each jury (defined as jurors who made fewer than three contributions, excluding non-verbal contributions (e.g. nodding), simple agreement (e.g. ‘yes, I agree’ with no expansion), or very short contributions made only as part of ‘going around the table’ to establish each juror’s view on what verdict they should return).

These are imperfect measures. The concept of a ‘dominant juror’, for example, is often used to imply an inappropriate dominance of discussion at the expense of others, but is used more neutrally here, simply to identify those who spoke very substantially more than others. Similarly, we could only record instances where jurors visibly appeared to be trying to speak but were interrupted or spoken over by others – we could not capture occasions where jurors wanted to contribute but kept silent. Nonetheless, when taken together, and in combination with jurors’ own views on the deliberation process (captured in the questionnaires they completed after deliberating), they provide an insight into patterns of participation.

Across a number of these measures, there was evidence of jurors being less able to participate in 15-person juries compared with 12-person juries:

- Jurors were more likely to be observed wanting to contribute, but being unable to do so, in 15-person juries (13 out of 32 juries) compared with 12-person juries (2 out of 32 juries).
- There were more dominant jurors, on average, in 15-person juries (1.8 jurors) than in 12-person juries (1.0 jurors). Jurors in 15-person juries were also more likely to agree that “some members of the jury talked too much” (41% of jurors in 15-person juries, compared with 28% in 12-person juries).
- There were more minimally contributing jurors, on average, in 15-person juries (2.5 jurors) than in 12-person juries (1.6 jurors).
- Jurors in 15-person juries also gave lower ratings of their own influence over the verdict in comparison with jurors in 12-person juries. When asked to rate their influence on a scale from 1 (none at all) to 7 (a great deal), jurors in 15-person

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<sup>78</sup> For more details on the how these aspects were recorded and analysed, see Annex G.

juries had an average rating of 4.1, compared with 4.5 among those in 12-person juries.<sup>79</sup>

The fact that 15-person juries contain more dominant and minimally contributing jurors might be expected simply by virtue of the larger group size. However, in combination these findings suggest that bigger juries may be associated with more jurors struggling to participate fully, and consequently with jurors feeling they have less influence on the final decision. It is also worth noting that, when reviewing 15-person juries, it was common for the research team to observe side conversations running concurrently within discussions. It was also common to note high levels of interruption and speaking over one another in 15-person juries, leading to a decreased sense of order within the deliberations overall.

There were no statistically significant differences in observed levels of juror contribution between unanimity juries and simple majority juries. However, there were some differences in jurors' own perceptions of their participation. Jurors who were asked to come to a simple majority verdict:

- Were more likely to disagree that they had felt able to say as much as they wanted (10% vs 5%).
- Were less likely to agree that they felt fully involved in the jury's decision (86% vs 92%).
- Gave lower ratings, on average, of their own influence over the verdict (4.1 among jurors asked to reach a simple majority vs 4.5 among jurors asked to reach a unanimous verdict).

In combination with the longer average deliberation time for unanimity juries, these findings suggest that requiring unanimity may provide more opportunity for everyone to feel they have been able to put their views across. This is consistent with previous research. For example, the *Inside the Jury* study compared 12-person juries that were required to reach either unanimity, 10 votes out of 12 or eight votes out of 12. The study found that, while there were no statistically significant differences in the frequency of jurors' participation, the relatively shorter deliberation time for juries deliberating under the 8/12 and 10/12 conditions meant that minimally participating jurors appeared much more frequently in those juries than in unanimous juries.<sup>80</sup>

There were no clear differences in observed or self-assessed juror participation and influence between two-verdict and three-verdict juries.<sup>81</sup>

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<sup>79</sup> See tables J.2 to J.6 in Annex J for full data.

<sup>80</sup> R Hastie, SD Penrod and N Pennington, *Inside the Jury* (1983) 91-92.

<sup>81</sup> While not the main focus of our research questions, there were some statistically significant differences in observed and self-assessed juror participation between the rape and assault trials. It is not appropriate to generalise from these, since they reflect the particular nature and content of the two trials in question. However, in summary: there were more minimally contributing and dominant jurors in assault trial juries and jurors were more often observed apparently wanting to contribute but being unable to do so in assault trial juries. But there were no statistically significant differences in jurors' own perceptions of their influence over the verdict, or their perceptions of whether other jurors spoke too much, between the two types of trial.



## 4.5 Observed tone and juror feelings about deliberations

The function of a jury is to come to a verdict based on a clear assessment of the evidence. Whether this process is calm or fraught, and whether jurors enjoy the experience are not primary considerations. However, in the context of attempting to understand how different features of the jury system might impact on the process of decision-making, the overall tone of discussions is potentially relevant, as is jurors' own level of confidence in the verdict returned.

The research team coded 27 of the 64 deliberations as 'almost always completely calm', 22 as 'occasionally heated or animated' and 15 as 'frequently heated or animated'. Based on this data, there was no clear, statistically significant difference in tone of deliberations between two-verdict and three-verdict juries. However, 15-person juries, and juries asked to reach unanimity, were each marginally more likely to become frequently heated or animated.<sup>82</sup>

Of course, designating a tone for the jury as a whole can be misleading, as the temperature of a discussion can fluctuate. Further analysis of researchers' notes on deliberation videos suggests that such fluctuations were particularly apparent in juries asked to reach a unanimous verdict, but where deeply entrenched differences between the jurors meant that the jury was struggling to agree. In these juries, exchanges tended to become more animated in the later stages of deliberation, when time was running out, even amongst those coded as only 'occasionally more heated' overall.

Overall, 81% of jurors said they were 'very' or 'fairly' confident that their jury had reached the right verdict. Unsurprisingly, juror confidence varied substantially depending on whether or not individual jurors personally agreed with the collective verdict returned. 93% of those who personally agreed with the jury's final verdict<sup>83</sup> were confident it was the right decision, compared with just 38% of those who did not. A related finding is that jurors required to reach unanimity were somewhat more likely to express confidence in the final verdict (87%, compared with 76% of jurors asked to reach a simple majority). Again, this is unsurprising since requiring unanimity means that jurors are more likely to agree with the verdict returned at the end of deliberations. Jurors asked to choose between three verdicts were also a little more likely to express confidence in their jury's decision (83%, compared with 78% of jurors asked to choose between two verdicts).<sup>84</sup> There was no statistically significant variation in juror confidence in the verdict between 12-person and 15-person juries.<sup>85</sup>

Finally, jurors were asked (after deliberating) how satisfied they felt with the experience of being a (mock) juror. Overall, levels of satisfaction were very high – 88% were very or fairly satisfied with the experience. Of course, the voluntary (and moderately remunerated) nature of this mock jury research means that this finding

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<sup>82</sup> See Annex J, Table J.7.

<sup>83</sup> Based on comparing what they personally said the verdict should be in their post-deliberation questionnaire with the verdict returned.

<sup>84</sup> See Annex J, Table J.8.

<sup>85</sup> While not directly relevant to the research questions, it is worth noting that confidence in the verdict was significantly higher among assault trial jurors (89%) than among rape trial jurors (73%).

is unlikely to transfer to the 'real' courtroom. What is of relevance is whether there were any differences by jury size, number of verdicts, or majority required. The only significant difference in this respect was that jurors asked to choose between two verdicts were slightly more likely to indicate that they had been dissatisfied with the experience than were jurors asked to choose between three verdicts (6% vs 3%).



## 5 How do jurors understand the not proven verdict?

### Key findings

- **The meaning and consequences of the not proven verdict were rarely discussed at any length** in deliberations, even in those juries where that verdict was returned.
- **Where the not proven verdict was discussed, there was inconsistency in understanding of its meaning and confusion over its effect.** In particular, jurors were not always clear how it differed (if at all) from a not guilty verdict.
- **The judge's direction that "not guilty and not proven have the same effect, acquittal, which means that the accused cannot be tried again for the same offence" does appear to increase juror understanding.** Jurors in two-verdict juries, who did not receive this direction, were more likely than jurors in three-verdict juries to think that the accused can be retried if the verdict is not proven.
- **The idea that the not proven verdict means the accused is guilty, but that guilt has not been proven to the necessary standard for conviction, arose frequently (though usually briefly) during deliberations.** Jurors also expressed the view that there is a lingering stigma attached to a verdict of not proven.
- **Related to this, jurors choosing the not proven verdict tended to base their decision on a belief that the evidence did not prove guilt beyond reasonable doubt, or on the difficulty in choosing between two competing accounts.**
- **Jurors choosing the not guilty verdict (where both acquittal verdicts were available), in contrast, tended to base this on a belief that the accused was innocent, or some aspect of the complainer's or witness' evidence that suggested that they were not giving a truthful account.**
- **More jurors thought that a verdict of not proven should be returned when jurors need to compromise to reach a verdict than believed a not guilty verdict should be used in that situation.** However, there was also a view that the not proven verdict was a "*cop out*".

## 5.1 Introduction

As outlined in Chapter 1, Scottish juries are unique in that they have two verdicts of acquittal open to them: not guilty and not proven. The legal consequences of the two verdicts are exactly the same – the accused is cleared of the charges and cannot normally be re-prosecuted for the same offence.<sup>86</sup> The not proven verdict's existence in Scots law has been described as a “historical accident”.<sup>87</sup> There were no set forms of verdict used by early juries: their role was simply to decide on the guilt or innocence of the accused. The role of the jury was altered in the early 17th century by a change in procedure whereby juries ceased to declare accused persons guilty or innocent, and instead returned ‘special verdicts’ considering whether individual factual allegations were proven or not proven. The decision on the guilt or innocence of the accused was then taken by the judge presiding over the case. In 1728, a landmark legal case (the trial of Carnegie of Finhaven) re-established the jury's right to return a verdict of not guilty, rather than leaving that decision to the judge. By the 19th century, lawyers had come to view the old ‘special verdicts’ as irrelevant. ‘Not proven’, however, had become something of a legal fixture, and juries continued to use it alongside ‘guilty’ and ‘not guilty’. This was not in its original meaning, where ‘not proven’ referred to a failure to prove individual facts, but as one of two acquittal verdicts that both meant a failure to prove guilt. The not proven verdict as it is used today is not defined in statute or case law. It is simply one of two possible acquittal verdicts and the standard text on Scottish criminal procedure states that juries should not be told anything about its meaning.<sup>88</sup>

This chapter presents findings on how jurors understand the not proven verdict and why they might choose it over the other verdicts available to them. It draws on data from two sources: individual questionnaires completed by jurors before and after their deliberations, and the jury deliberation transcripts and videos.

Of the 64 mock juries in our study, half (32) had two verdicts open to them (that is, they could only return a verdict of guilty or not guilty) and half were able to choose between three verdicts (guilty, not guilty or not proven). In his final directions to jurors, the judge in the trial films told them which verdicts were available to them. Jurors in two-verdict juries were told simply that there were two verdicts open to them – guilty and not guilty. In three-verdict juries, jurors were given additional direction on the not proven verdict, based on the guidance given to Scottish judges for directing juries in real trials, as follows:

“Finally, I need to tell you that there are three verdicts you can return on this charge: not guilty, not proven, or guilty. Not guilty and not proven have the same

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<sup>86</sup> The precise legal position regarding re-prosecution is described in more detail in section 5.4.2 below.

<sup>87</sup> I Willock, *The Origins and Development of the Jury in Scotland* (Stair Society, 1966) 217. The explanation of the history of the not proven verdict that follows is drawn from Willock's book.

<sup>88</sup> GH Gordon, *Renton and Brown: Criminal Procedure according to the Law of Scotland*, 6<sup>th</sup> edn (1996) para 18-79.41.

effect, acquittal, which means that the accused cannot be tried again for the same offence.”<sup>89</sup>

Aside from this direction, jurors were told nothing about the not proven verdict. If jurors did ask questions about it, the researchers told them that they were unable to provide any further guidance. The not proven verdict was not mentioned at all in the questionnaire that jurors completed prior to deliberating, except that jurors were asked to state what they thought the verdict should be (so jurors in three-verdict juries had the option of choosing not proven). After deliberating, however, jurors in both two-verdict and three-verdict juries were asked a number of questions about their understanding of the not proven verdict. A questionnaire with the same questions about the not proven verdict was also completed by ‘spare’ jurors (those who watched the trial videos but who were not needed for the deliberations).<sup>90</sup> Subsequent references to post-deliberation questionnaire data therefore includes the responses of these ‘spare’ jurors as well as those who actually deliberated.

## 5.2 Extent of discussion of not proven during deliberations

The research team coded the level of discussion of not proven’s meaning or consequences in each jury deliberation, recording whether this was discussed “in some detail”, only “minimal references” were made, or it was not discussed at all.

Across the study it was rare for any very lengthy discussion of the not proven verdict to take place, even in juries where that verdict was ultimately returned. The code “in some detail” therefore covered anything other than the most minimal discussion.

There were no statistically significant differences in the level of discussion of not proven between 12 and 15-person juries, or between juries asked to reach a unanimous verdict and those required to reach a simple majority (see Annex J, Table J.9). Juries in rape trials were marginally more likely than their assault trial counterparts to discuss not proven “in some detail”, although they were no more likely to return a verdict of not proven at the end of the deliberation process.<sup>91</sup>

Unsurprisingly, however, the not proven verdict was much more likely to be discussed “in some detail” by juries that had it available to them. In 11 of the 32 three-verdict juries, the not proven verdict was discussed “in some detail”. Most of those juries (nine out of the 11) were juries in which a not proven verdict was returned. However, in five of the 32 three-verdict juries there was no discussion at all of the meaning or consequences of the not proven verdict, despite the fact that, in four out of these five, a not proven verdict was ultimately returned. Moreover, in two out of these five juries, several jurors switched their verdict from either guilty or not guilty to not proven during the course of the deliberations.<sup>92</sup> There was no

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<sup>89</sup> The direction was taken from the Judicial Institute for Scotland’s *Jury Manual* (2019).

<sup>90</sup> See Annex E for details of the different questionnaires. For an explanation of ‘spare’ jurors, see section 2.4.

<sup>91</sup> See section 3.4.

<sup>92</sup> Five of 15 in one of the juries and four of 15 in the other. As discussed in section 5.5.1, however, jurors rarely gave explicit reasons for switching verdict.

obvious pattern in terms of trial type, majority required, or length of deliberation to the five juries where the not proven verdict was not discussed at all.<sup>93</sup>

It is notable that there was also at least some discussion of the not proven verdict in half (16 of 32) of juries in the two-verdict condition, despite there having been no mention of it in the judge's directions or pre-deliberation questionnaire. This indicates that there is wider awareness of the not proven verdict among the general public. The nature of this discussion was either simply to point out that a not proven verdict would normally be available in a Scottish criminal trial, or to lament the fact that it was not available to them – usually because jurors were finding it difficult to decide on a verdict. For example:

*"I don't think there is enough evidence against [the accused], and that's it in a nutshell, it's quite clear. I would like to have a not proven verdict or something like that but can only go for not guilty."*

(Assault trial / two-verdict / 15-person / unanimity)

### 5.3 Self-assessed understanding of not proven

After returning a verdict, all jurors were asked to assess how well they felt they understood the not proven verdict (on a scale of 1 to 7, where 1 was "I do not understand the not proven verdict at all" and 7 was "I fully understand the not proven verdict"). Of course, self-assessed understanding does not necessarily equate to actual understanding.<sup>94</sup> The ways in which jurors actually understood the not proven verdict are explored in the next section of this chapter (5.4). However, 51% of all jurors felt that they 'fully understood' the not proven verdict.

Self-assessed understanding of not proven was higher in three-verdict juries (58% indicated that they fully understood the verdict, compared to 45% in two-verdict juries).<sup>95</sup> There were no statistically significant differences in average levels of self-assessed understanding of not proven by gender, age, education level, trial type, jury size or majority required.

During deliberations, jurors sometimes expressed uncertainty or confusion about the not proven verdict. In nine of the 32 three-verdict juries, jurors either stated that they did not understand the not proven verdict or asked other jurors (or in one case,

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<sup>93</sup> Four of the five were assault trial juries; one was a rape trial jury. Four were simple majority juries; one was a unanimity jury. Two of the juries involved very short deliberations (19 minutes and 24 minutes), indicating that discussion generally (i.e. not just of the not proven verdict) was limited. The other three had deliberation times of 35 minutes, 41 minutes and 50 minutes.

<sup>94</sup> Research suggests that jurors think they understand legal concepts better than they actually do and that confidence does not necessarily equate to accuracy: see L Hope, N Eales and A Mirashi, "Assisting jurors: promoting recall of trial information through the use of a trial-ordered notebook" (2014) 19 Legal and Criminological Psychology 316 at 326 and B Saxton, "How well do jurors understand jury instructions? A field test using real juries and real trials in Wyoming" (1998) 33 Land and Water Law Review 59 at 92.

<sup>95</sup> This mirrors the findings of Hope and others' research (cited in section 1.2.2), where self-assessed understanding of the not proven verdict was also significantly higher among jurors who had been directed on the verdict than those who had not – see study 1 (at 246) and study 2 (at 249).

the researcher) what it meant. The nature of their uncertainty varied. In one jury, it was centred on whether not proven was actually a verdict of acquittal:

*“Well, acquitting is not ‘not proven’, that’s not guilty.”*

*“Is that not guilty?”*

*“No, that’s not proven, you must acquit..So, basically not saying he was guilty.”*

*“So, you add the not proven and not guilty together.”*

*“I don’t understand that.”*

(Assault trial / three-verdict / 12-person / simple majority)

In two other juries, jurors expressed uncertainty about whether not proven and not guilty are the same thing, or whether not guilty differs because it requires proof of innocence.<sup>96</sup> In another, a juror asked whether not proven would automatically be the verdict if the jury was split 50/50 between acquittal and conviction. Thus, while the judge’s instructions appear to go some way to improving juror understanding of the not proven verdict, a lack of clarity about its precise meaning and use persisted among some jurors.

It should be stressed, though, that while there was some uncertainty over the meaning of the not proven verdict, jurors relatively rarely expressed beliefs about the verdict that were definitively incorrect. This is in part because, as noted earlier, the not proven verdict does not have a specific definition beyond it being one of two verdicts of acquittal. This leaves room for a number of different understandings of its meaning and purpose, which are explored below.

## **5.4 Specific understandings of the not proven verdict and its consequences**

After deliberating, jurors were asked a number of questions about the not proven and not guilty verdicts as part of the post-deliberation questionnaire. These were designed to explore their understanding of the differences between the two acquittal verdicts, and why jurors might choose one over another. This section reports on findings from these questions and on the various ways in which the not proven verdict was discussed during deliberations.

### **5.4.1 “Guilty, but you can’t prove it”**

The idea that the not proven verdict should be used if jurors suspect the accused is guilty, but feel that this has not been proved beyond reasonable doubt, was the most prominent theme in both the deliberations and questionnaire responses.

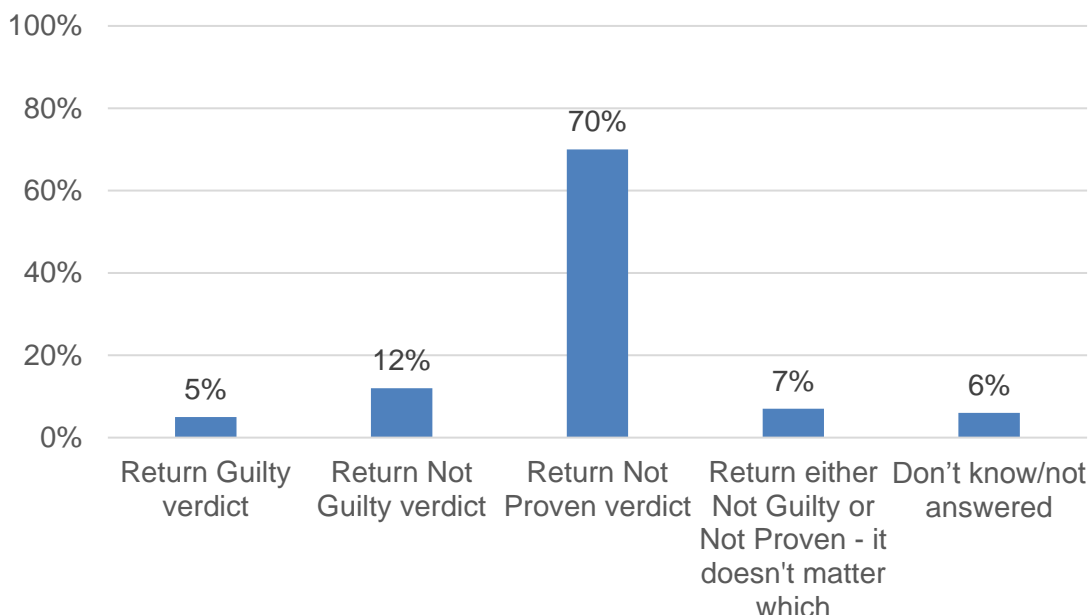
A majority (70%) thought that if a jury thinks the accused is guilty, but do not think the evidence proves it beyond reasonable doubt, they should return a verdict of not proven. Just 7% said that it does not matter which of not proven or not guilty is returned, and 12% that the jury should return a verdict of not guilty (Figure 5.1). The view that not proven is the most appropriate verdict if jurors think the accused is guilty but the standard of proof has not been met was more common among: rape

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<sup>96</sup> A point that is returned to later – see section 5.4.5.

trial jurors than assault trial jurors (75% compared to 64%); jurors who had the not proven verdict available during their deliberations compared with those asked to choose between guilty and not guilty (77% compared 63%); and jurors asked to reach a simple majority compared with those asked to reach a unanimous verdict (73% compared to 66%).<sup>97</sup>

Figure 5.1: Juror views on the appropriate verdict if they think the accused is guilty but the evidence does not prove it beyond reasonable doubt



Base: All jurors (n = 969)

The view that not proven should be used when the jury thinks the accused is guilty but that the evidence does not meet the required standard of proof was also voiced during deliberations – 31 such statements were made across 14 of the 32 three-verdict juries.<sup>98</sup> For example:

*First juror: “Not guilty is completely different to not proven.”*

*Second juror: “Not proven is guilty, but you can’t prove it.”*

*First juror: “Not officially.”*

(Rape trial / three-verdict / 12-person / simple majority)

#### 5.4.2 “Not proven means you could still be brought back to trial”

As noted above (section 5.1), jurors in the three-verdict juries were told by the judge that “not guilty and not proven have the same effect, acquittal, which means that the accused cannot be tried again for the same offence”. Jurors in the two-verdict juries did not receive this direction.

<sup>97</sup> See Annex J, Table J.10.

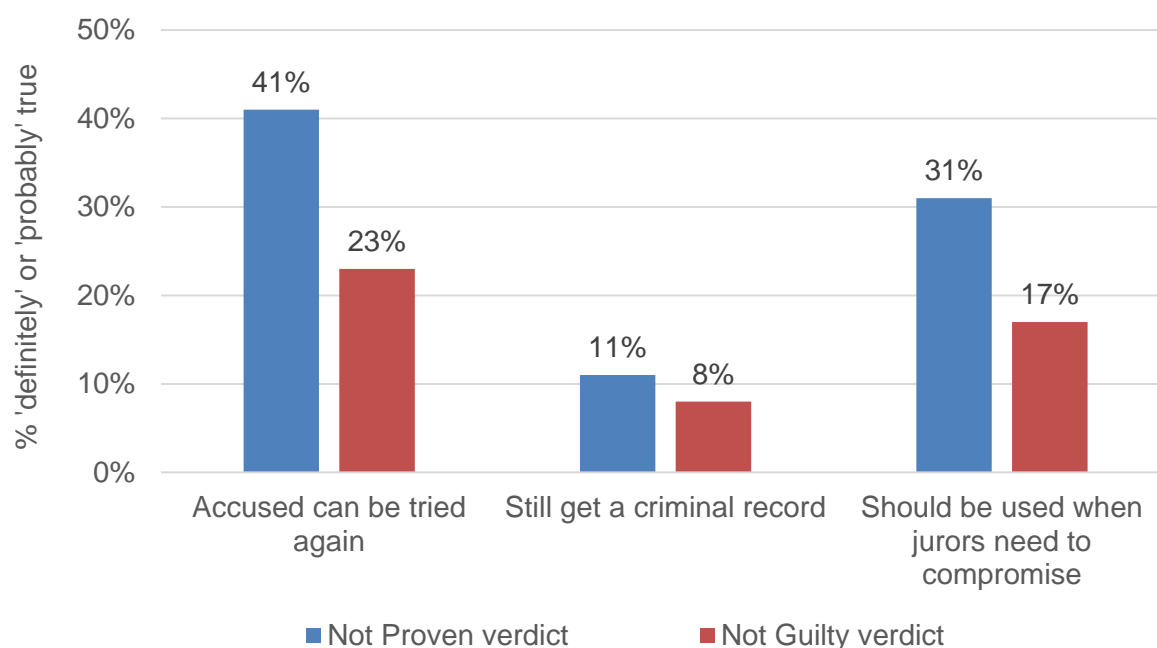
<sup>98</sup> There were also 10 statements to this effect across six of the 32 two-verdict juries.



In fact, the legal position regarding retrial following an acquittal verdict is now slightly more complex than this direction implies. Since the Double Jeopardy (Scotland) Act 2011 came into force, the prosecution can apply for permission to re-prosecute following an acquittal, although only in limited circumstances (primarily where either the acquitted person has subsequently admitted to committing the offence or, in serious cases, where fresh evidence has arisen that substantially strengthens the case against them).<sup>99</sup> Analysis of the deliberations indicated that a small number of jurors in this study were aware of these provisions. The important point, however, is that such an application for re-prosecution can be made *regardless* of whether the verdict is not guilty or not proven. There is thus no difference between the two acquittal verdicts in relation to the possibility of retrial.

Our mock jurors were much more likely to think that a retrial was possible after a not proven verdict than after a not guilty one – 41% thought it was definitely or probably true that ‘the accused can be tried again’ after a not proven verdict compared with 23% who thought the same applied after a not guilty verdict (Figure 5.2).

Figure 5.2: Jurors’ understanding of the not proven and not guilty verdicts’ effects (% saying statements definitely or probably true)



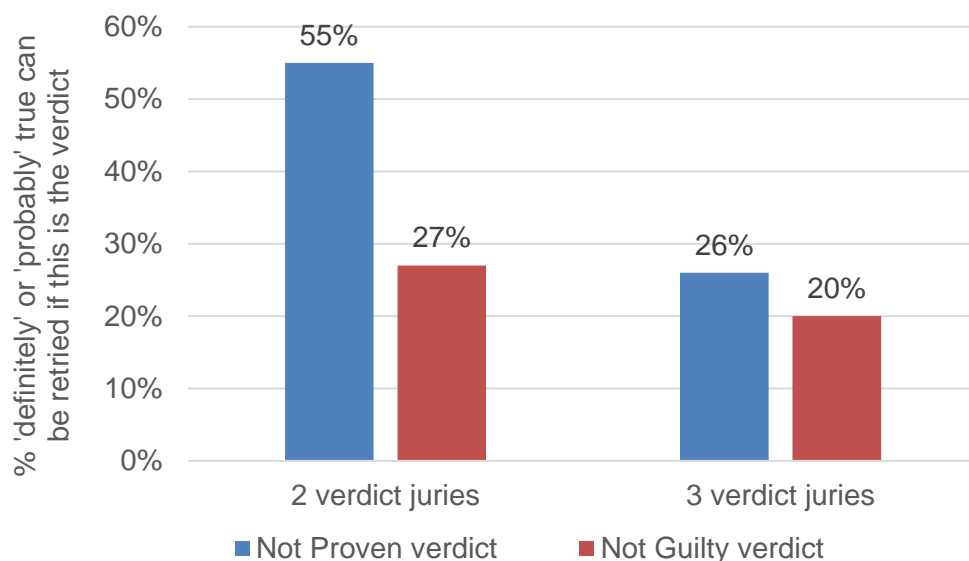
Base: All jurors (n = 969)

The judge’s direction does, however, appear to improve jurors’ understanding of this issue. Jurors in two-verdict juries (who were not directed on this point by the judge) were much more likely than those in three-verdict juries (who were directed) to think that the position on retrial was different for each acquittal verdict (Figure 5.3). This is consistent with the findings of Hope and others, in which jurors who had been directed on the not proven verdict were significantly less likely to believe

<sup>99</sup> See Double Jeopardy (Scotland) Act 2011 sections 3 and 4.

that the accused could be re-tried for the same offence following a not proven verdict.<sup>100</sup> However, even in three-verdict juries, jurors were still more likely to say someone can be retried after a not proven verdict (26%) than after a not guilty verdict (20%) (Figure 5.3). Some confusion about the possibility of a retrial with each verdict appears, therefore, to persist. There were no statistically significant differences in views about the possibility of retrial by jury size or by majority required.

Figure 5.3: Juror beliefs about the possibility of retrial after (a) not proven and (b) not guilty verdicts, by whether they were asked to choose between two or three verdicts



*Bases: All jurors – two-verdict jurors = 484, three-verdict jurors = 485*

Whether the accused could be retried following a not proven verdict was also raised repeatedly during deliberations. In total, 21 statements on this topic were made across 12 of the 32 three-verdict juries: 11 expressing the view that this was possible, and 10 expressing the view that it was not.<sup>101</sup> Jurors' claims that an accused person can be retried following a not proven verdict were not always clearly incorrect, given the possibility of retrial under the Double Jeopardy (Scotland) Act 2011. However, in five cases (in five different juries), jurors wrongly claimed that retrial is possible following a not proven verdict, but not following a verdict of not guilty:

*“Not proven means that you could still be brought back to trial again. Not guilty means you can’t.”*

(Rape trial / three-verdict / 12-person / unanimity)

<sup>100</sup> Hope and others (see citation in section 1.2.2) at 249. The difference was even more stark in her study, with 37% of three-verdict participants believing the accused could be re-tried for the same offence following a verdict of not proven, compared to 87% of two-verdict participants.

<sup>101</sup> Seven statements were also made in the two-verdict juries (six expressing the view that retrial was possible after a not proven verdict).



Only one of these five statements was corrected by another juror, but this did not seem to be effective, as the juror who made the original statement went on to express the incorrect belief again.

All of these statements about not proven and the possibility of retrial occurred in the context of general discussions about not proven's meaning and how it might differ from not guilty. There were no examples of jurors referring explicitly to the possibility of retrial as a factor that led them to choose one verdict over the other, although it is, of course, possible that this influenced their decision.

#### 5.4.3 "The middle ground"

When asked which verdict should be used 'when the jurors need to compromise to decide on a verdict' significantly more jurors selected not proven than not guilty (31% compared to 17%, respectively) (Figure 5.2, above).

The notion of not proven as a 'compromise verdict' also arose during deliberations, with statements to this effect made in five of the three-verdict juries.<sup>102</sup> All five of these juries ultimately returned a not proven verdict. This view of the not proven verdict was sometimes linked with an expression of relief that the verdict was available as a way of ending deliberations:

*"... if you didn't have the not proven verdict and you either had to find him guilty or not guilty then ..."*

*"We would be here all week."*

(Rape trial / three-verdict / 12-person / unanimity)

However, there were also examples of jurors describing the not proven verdict as a "cop-out", suggesting that it excused the jury from deliberating more fully or from making a more difficult decision:

*"... it's a bit of a cop out, rather than people really considering things really, really, carefully"*

(Rape trial / two-verdict / 12-person / unanimity)

*"... most people go for the middle ground because it's the easiest option and I think the danger of a situation like this, is that because you're not 100 per cent sure, which none of us are, you're just thinking it's safer just to say not proven ..."*

(Rape trial / three-verdict / 15-person / simple majority)

#### 5.4.4 "If you've got a not proven for rape on your criminal record you're not working anywhere"

A verdict of not proven is a verdict of acquittal. It would not, therefore, form part of the accused's record of criminal convictions held by the court (which is given to the

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<sup>102</sup> And in four of the two-verdict juries. In the two-verdict juries, this was always in the context of jurors wishing that the not proven verdict was available to them, so that they could more easily reach a verdict.

judge to take into account in sentencing if the accused is ever convicted of a subsequent offence).

Despite a not proven verdict not being a conviction, it is possible that information about it could be disclosed to future employers as part of a Protecting Vulnerable Groups (PVG) background check.<sup>103</sup> This could occur if the fact of the not proven verdict has been recorded by the police and is considered by them to be relevant to the purpose of a PVG check under the relevant legislation (section 47 of the Protection of Vulnerable Groups (Scotland) Act 2007). The treatment of the not proven verdict in this way is no different from the not guilty verdict – either could potentially be disclosed as part of a PVG check in certain circumstances.

When asked directly (in the post-deliberation questionnaire), mock jurors did not appear to draw any significant distinction between not proven and not guilty in terms of their implications for the accused's criminal record. There was no statistically significant difference in the (relatively low) proportions of jurors who thought that the accused would get a criminal record following a not proven compared to a not guilty verdict (11% for not proven vs 8% for not guilty – see Figure 5.2).

This finding sits slightly at odds, however, with analysis of the content of jury deliberations. Although statements about the effect of a not proven verdict on the accused's criminal record were relatively rare, there was some evidence of misunderstanding. Ten statements were made on this topic across five of the 32 three-verdict juries.<sup>104</sup> Six out of 10 statements implied that a not proven verdict would result in a criminal record, and four that it would not. Of the six statements indicating that a not proven verdict would appear on the accused's criminal record, four could be classed as definitely incorrect – they wrongly stated that if the accused was tried for a different criminal offence in the future, the jury would be told about the previous not proven verdict.<sup>105</sup> The two other statements referred to the perceived effect a not proven verdict might have on subsequent employment. One made brief reference to possible disclosure of a not proven verdict to potential employers, while the other was a longer passage of discussion, starting with the following claim:

*“If you've got a not proven for rape on your criminal record, you're not working anywhere, or you have no life anyway, so you're going to suffer anyway.”*

(Rape trial / three-verdict / 15-person / unanimity)

This was followed by a debate about whether someone who had received a not proven verdict would have to disclose this to future employers. No definitive conclusion was reached and the discussion moved on, with no further reference to this issue.

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<sup>103</sup> The Protecting Vulnerable Groups (PVG) check is a scheme intended to ensure that people whose behaviour makes them unsuitable to work with children and/or protected adults are prevented from doing 'regulated work' with these vulnerable groups.

<sup>104</sup> Nothing was said about an impact upon criminal records in the two-verdict juries.

<sup>105</sup> This is incorrect as previous acquittals (and convictions) are generally inadmissible evidence in a Scottish criminal trial.

This pattern was common across other juries that discussed the perceived implications of not proven for the accused's 'record' – regardless of whether incorrect statements were corrected, the issue did not appear to have any bearing on subsequent discussions. Overall then, while there is evidence that some jurors may mistakenly believe a not proven verdict has different implications to not guilty for the accused's record, this did not appear to be an explicit driver for choosing one acquittal verdict over another (although again, it is impossible to know if individual jurors may have been influenced by this belief but did not voice that during deliberations).

#### **5.4.5 “Not proven means the jury feel that they cannot prove the person is innocent”**

The idea that a not proven verdict should be used when the accused has not 'proved his innocence' arose in 10 of the 32 three-verdict juries, with 15 statements made to this effect.<sup>106</sup> There is, of course, no requirement to 'prove' innocence in legal proceedings, and all juries were directed on this by the trial judge:<sup>107</sup>

“I now deal with some fundamental principles of law that apply in every case. The first is this. Throughout the trial every accused is presumed innocent unless proved guilty. The accused is not required to prove his innocence. Secondly, it's for the Crown to prove the guilt of the accused on the charge he faces. If that's not done an acquittal must result. The Crown have the burden of proving guilt. Thirdly, the Crown must establish guilt beyond reasonable doubt.”

Nonetheless, it was apparent that some jurors felt not proven should be used when innocence has not been 'proved':

*“[Not proven] means that the jury feel that they cannot prove that the person is innocent, it means that they don't think...they think that there has possibly been a rape, but they don't feel that the evidence is strong enough.”*

(Rape trial / three-verdict / 12-person / simple majority)

In some instances, jurors distinguished between the not proven and not guilty verdicts in precisely these terms (that is, that not guilty indicates that the accused has proven their innocence, whereas not proven indicates that they have not):

*“... the difference between not proven and not guilty is not guilty is you believe there is evidence to prove that he is not guilty.”*

*“But, the outcome is the same.”*

*“The outcome from our perspective is the same.”*

(Assault trial / three-verdict / 15-person / simple majority)

In the jury quoted above, this assertion led to a short debate, with another juror disagreeing that the not proven and not guilty verdicts differed in this way. Despite this, the juror who expressed the initial view then repeated it, stating that:

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<sup>106</sup> Statements to this effect were also made in two of the 32 two-verdict juries.

<sup>107</sup> See Judicial Institute for Scotland, *Jury Manual* (2019) 5.15.

*“Not guilty is there is evidence to prove that he did not do what they were accused of. Guilty is there is evidence that tells you. Not proven tells you there is no evidence.”*

(Assault trial / three-verdict / 15-person / simple majority)

Discussion then moved on and the point was not discussed again (the jury ultimately returned a majority not proven verdict). In two other juries where this view was expressed, other jurors also interjected to disagree and challenge (in both cases referring to the judge’s direction that the accused is innocent until proven guilty), but the point was not discussed further in either case, which makes it difficult to assess what impact such views had on the verdict these juries returned. However, there were examples where a belief that the accused had not proved their innocence appeared to be one reason why individual jurors favoured a not proven verdict over one of not guilty:

*“I couldn’t say he was innocent and let it go, but I couldn’t say he done it, it was right in the centre for me.”*

(Rape trial / three-verdict / 15-person / simple majority)

#### **5.4.6 “You’ve got a black mark against you”**

A final theme that emerged during deliberations was the perception that there is an element of stigma attached to a not proven verdict. Seven statements were made to this effect across six of the 32 three-verdict juries (four in assault trial juries; three in rape trial juries).<sup>108</sup> It was suggested that a not proven verdict means “*you’ve got a black mark against you*”, or that “*doubt*” would exist in people’s minds about whether the accused was guilty. This perceived ‘stigma’ was linked with the view (discussed in 5.4.1) that juries should return a not proven verdict when they think the accused is guilty, but the evidence does not prove this beyond reasonable doubt.

*“You walk away innocent, but everybody knows.”*

(Rape trial / three-verdict / 15-person / simple majority)

In all these cases, it was clear that jurors understood the legal position (that a verdict of not proven is a verdict of acquittal), but that despite this, they felt there would be a lingering stigma attached to such a verdict.

Beliefs about the perceived ‘stigma’ of a not proven verdict were explicitly cited by three jurors as a reason why they favoured a particular acquittal verdict. All three were rape trial jurors. Two jurors (in different juries) stated that they supported a not guilty verdict over one of not proven because, as one put it, they were “*not prepared to imply someone’s committed rape*”. Conversely, the third juror stated that their choice of not proven was intended to send a message to the accused that they doubted his story. These views did not appear to influence other jurors – indeed two of the jurors expressing opposing views were on the same jury and

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<sup>108</sup> Three statements to this effect were also made across three of the 32 two-verdict juries (all rape trial juries).

neither explicitly stated that they had changed their mind as a result of the other person's opinion – but it cannot be ruled out that other jurors were influenced by these statements about stigma without expressly saying so.

## 5.5 Reasons for choosing one acquittal verdict over the other

Establishing exactly why jurors chose a particular verdict was often challenging. Jurors did not always give clear or illuminating reasons for favouring a particular verdict (either in their questionnaire or during deliberations), and those in three-verdict juries almost never explained exactly why they had selected one acquittal verdict over the other. However, comparison of jurors' stated reasons for choosing (a) not proven and (b) not guilty (drawing on both questionnaire data<sup>109</sup> and jurors' deliberations) suggests that there are some general differences in reasons for choosing the two acquittal verdicts.

In summary, jurors choosing the not guilty verdict (where both acquittal verdicts were available) tended to justify this in one of two ways:

- The first was that they believed the accused was innocent. This contrasts with jurors who chose the not proven verdict, who tended to justify this on the basis that guilt had not been proved beyond reasonable doubt (sometimes accompanied by a belief that the accused was probably guilty, and sometimes by a belief that there was not enough evidence to form a view either way).
- The second was that they believed one or more of the prosecution witnesses were lying. Again, this contrasts with those who favoured not proven, who tended to justify this on the basis that they found it difficult to decide between the truthfulness of the different witnesses' accounts.

A more detailed comparison of reasons for choosing not guilty and not proven in each trial shows that jurors who favoured not proven were:<sup>110</sup>

- More likely to refer to the difficulty of choosing between the accounts given by the complainant and the accused (28% of rape trial jurors who thought the verdict should be not proven, compared to 12% of jurors who thought the verdict should be not guilty; the equivalent figures for the assault trial were 17% vs 6%).
- For the assault trial only, significantly more likely to refer in general terms to whether there was enough evidence to convict, or to additional evidence they felt was needed (for example, 60% of assault trial jurors who thought the verdict should be not proven cited insufficient evidence to convict vs. 41% of assault trial jurors who thought the verdict should be not guilty).
- For the rape trial only, significantly more likely to refer specifically to whether the case had been proved 'beyond reasonable doubt' (34% of rape trial jurors who

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<sup>109</sup> See Tables J.11 and J.12, based on jurors' explanations of their initial verdict preferences (prior to deliberating). Jurors were also asked in the post-deliberation questionnaire for their personal choice of verdict and the reasons for this. These reflected similar themes to the reasons given pre-deliberation but, as so few jurors in the three-verdict condition selected a not guilty verdict at this stage, there were insufficient numbers for meaningful analysis. The data is based on an open-ended question, with responses categorised by Ipsos MORI's specialist coding team, using a code frame developed by the research team.

<sup>110</sup> Tables J.11 and J.12, Annex J.

thought the verdict should be not proven cited this vs. 19% of rape trial jurors who thought the verdict should be not guilty).

- In the rape trial only, jurors who favoured not proven were less likely to refer to specific elements of the evidence, and tended instead towards more general statements, such as 'not enough evidence to convict' (42% of jurors who thought the verdict should be not proven referred to specific elements of the evidence, compared with 65% of jurors who thought the verdict should be not guilty).

(See Annex J, Tables J.11 – J.13 for more detail).

These findings are consistent with discussions during the deliberations, where – among those jurors who expressed a reason for their choice of verdict – there was clear variation in the kinds of reasons cited by those who chose not proven and those who chose not guilty. Stated reasons for favouring not proven often reflected jurors' different understandings of not proven discussed above – for example, choosing it because they were not convinced of the accused's innocence. Jurors also noted difficulty choosing between the accounts given by the accused and the complainer as a reason for choosing not proven (in both assault and rape trials):

*"Well, the thing is if you had two children and you had a falling out and you weren't there, which of them would you believe? You know, if you had two kids and they had a disagreement about something would you say you're guilty, or would you say I'm not really sure and not proven? I would say, well I wasn't really there so I can't decide which of you, I'm not 100 per cent sure. That's why I would say as well not proven, because I wasn't actually there, I didn't see what happened."*

(Assault trial / three-verdict / 12-person / unanimity)

*"I think it's very difficult with this because it's only one against one, there is no other witnesses. And I mean it's kind of a ... quite a hard thing to say which one is innocent or not, I'm finding it difficult. One minute we're looking at I was with him, and the next minute I was with her, and I'm finding it difficult ... I would say not proven, because I'm not sure."*

(Rape trial / three-verdict / 15-person / unanimity)

Other jurors linked their choice of a not proven verdict to the corroboration rule. As noted earlier (section 4.3.2), all juries were directed that the accused cannot be convicted on one source of evidence alone (in line with the way juries would be directed in a real Scottish criminal trial). This direction was picked up among jurors choosing a not proven verdict, particularly in the rape trial. For example:

*"Yes, I'm going not proven, because I think that [the complainer] is credible and reliable and I believe her testimony, but as the judge said, we need to have corroboration and I don't think it was beyond reasonable doubt corroboration."*

(Rape trial / three-verdict / 15-person / unanimity)

A final related theme, which again was most prominent in the rape trial, was jurors justifying their choice of not proven on the basis that they personally thought the



accused was guilty but were not sure of this beyond reasonable doubt. For example:

*"I think he was guilty, but I would probably have to go for a not proven because I think the fact that they couldn't prove beyond whatever reasonable doubt that she got the bruises from an attack means that really reluctantly I would probably have to go not proven. Although on the basis of her testimony and his, I definitely believe her."*

(Rape trial / three-verdict / 15-person / simple majority)

Again, this is consistent with the finding, discussed above (section 5.4.1), that 70% of all jurors believed not proven is the most appropriate verdict when jurors think the accused is guilty but that this has not been proved beyond reasonable doubt.

There was evidence of unease among some rape trial jurors about choosing the not proven verdict when they believed that the accused was probably guilty. For example, one juror who thought not proven was the correct verdict nonetheless spoke of the accused "*walking away*" if he was in fact guilty and found this "*difficult*". Another, who also supported a not proven verdict on the basis that the case had not been proved beyond reasonable doubt, nonetheless felt that this verdict was "*unfair*" to the complainer and could be seen as "*saying that we're sanctioning rape*".

### 5.5.1 Reasons for switching between acquittal verdicts

69 of the 431 jurors (16%) deliberating in three-verdict juries switched between the two acquittal verdicts over the course of deliberations.<sup>111</sup> This switch was most commonly from not guilty to not proven (12% of three-verdict jurors switched in this direction, with 4% changing from not proven to not guilty).

The scope for analysis of reasons for switching between acquittal verdicts is limited by the low numbers – of the 69 jurors who switched, only 48 gave a reason for doing so in their post-deliberation questionnaire.<sup>112</sup> Moreover, the reasons given were not always particularly illuminating – the most common reason was simply that they had been persuaded by the discussion (67% of jurors who switched between acquittal verdicts and gave a reason for having done so). Other reasons for switching between acquittal verdicts generally reflected the themes already discussed: jurors' views by the end of deliberation on whether there was enough evidence or proof in general (33%); the perceived reliability and credibility of the complainer (23%) and witness (19%); and difficulties in choosing between inconsistent accounts or evidence (17%).

There were only five examples of jurors giving an explicit account during deliberations of their reasons for switching between the two acquittal verdicts. Again, their explanations reflected jurors' reasons for favouring not proven or not

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<sup>111</sup> This figure is based on comparison of the verdicts they favoured in their pre- and post-deliberation questionnaires.

<sup>112</sup> This reflects the fact that a small number of jurors appeared to have changed verdicts based on the verdicts they recorded on their pre- and post-deliberation questionnaire, but appeared not to recall having done so when asked directly about this.

guilty, discussed above – for example, becoming convinced of the accused's innocence (as a reason for switching from not proven to not guilty), or difficulties choosing between the accounts of the accused and the complainer (as a reason for switching in the opposite direction).



## 6 Conclusions

This final chapter summarises the conclusions that can be drawn from this study with respect to the two key research questions:

- **What effects do the unique features of the Scottish jury system (majority, size and the three-verdict system) have on jury reasoning and jury decision-making?**
- **What are jurors' understandings of the not proven verdict and why might they choose this verdict over another verdict?**

Each of the three unique features of the Scottish jury system – 15 members, simple majority verdicts, and the availability of the not proven verdict – is discussed in turn, along with the potential implications of any changes to those features.

### 6.1 What effects do the unique features of the Scottish jury system have on jury reasoning and jury decision-making?

#### 6.1.1 What impact do the unique features have on verdict choice?

At jury level, there were no statistically significant differences in the proportion of guilty versus acquittal verdicts returned between juries that had the not proven verdict available and juries that did not, between 12 and 15-person juries, or between juries asked to reach a unanimous verdict and those asked to reach a simple majority. This is unsurprising given the sample size.

There were, however, a number of statistically significant differences in verdict preferences of individual jurors, namely that:

- **When the not proven verdict was available, more individual jurors favoured acquittal.** This difference was apparent both before and after deliberation – in other words, the availability of not proven was associated with individual jurors being less likely to favour a guilty verdict, independently of any impact of deliberating as a group.
- **Jurors in 15-person juries were less likely to change their minds on the verdict than jurors in 12-person juries.** Although jurors in 15-person juries were more likely to think the verdict should be guilty (after deliberating) than were jurors in 12-person juries, this does not necessarily indicate that 15-person juries would be more likely to return guilty verdicts across a larger number of differently balanced trials. Rather, it is a reflection of the related finding that jurors in 15-person juries were less likely to change their initial view on the verdict than jurors in 12-person juries. The reason for this may simply be one of jury dynamics – in a 15-person jury, on average more people would need to shift their position to change the outcome. There may, therefore, be less motivation for 'minority' jurors in a 15-person jury (which in this case was usually those who favoured guilty) to shift that position to bring deliberations to a close.

- **Whilst jurors who were asked to reach a simple majority were more likely to think the verdict should be guilty (after deliberating) than those who were asked to reach a unanimous verdict, this does not necessarily imply that requiring unanimity would result in fewer guilty verdicts. It might simply reflect a greater tendency among jurors who favour a minority verdict at the outset to move towards the majority position during deliberations. However, there is evidence to suggest that jurors may be less willing to move from acquittal to guilty when the initial balance of opinion is the other way around – five of the six unanimity juries that started out with a majority for guilty ended up hanging, compared with one of the 25 unanimity juries that started with a majority for acquittal.**

Taken together, these findings suggest that:

- **Reducing jury size from 15 to 12** might, in some trials, lead to more individual jurors switching their position to facilitate a verdict.
- **Moving from requiring juries to reach a simple majority to requiring unanimity** or near unanimity might tilt more jurors in favour of acquittal – and might, therefore, lead to more acquittals over a larger number of trials.
- **Removing the not proven verdict** might incline more jurors towards a guilty verdict – and might, therefore, lead to more guilty verdicts over a larger number of trials.

It is not possible, based on these findings, to estimate the likely scale of any impact on the verdicts juries reach arising from changing these features, since the precise effect will depend on other factors including the balance of evidence and the initial balance of opinion in the jury in each trial. However, analysis of interactions between the different features suggests that the feature that makes the most difference to individual juror views on the verdict is the majority required. Moreover, this is the only difference that was statistically significant across both the rape and the assault trial juries – jury size and the number of verdicts available were significantly associated with individual verdict preferences in the assault trial only.

The combination of features most likely to tilt jurors towards acquittal appears to be 12-person, three-verdict, and unanimity required, while the combination most strongly associated with jurors favouring a guilty verdict is 15-person, two-verdict, simple majority. Neither of these is the system currently employed in either Scotland or most other English language jurisdictions. However, the latter would be the system in Scotland if the not proven verdict were removed with no other changes being made.

### **6.1.2 What impact do the unique features have on how juries reach decisions?**

15-person juries were associated with somewhat lower levels of juror participation than 12-person juries across a number of measures. For example:

- Jurors were more likely to be observed wanting to contribute, but being unable to do so in 15-person juries.

- There were more dominant jurors and more minimally contributing jurors, on average, in 15-person juries.
- Jurors in 15-person juries were more likely to agree that “some members of the jury talked too much”.
- Jurors in 15-person juries gave lower ratings of their own influence over the verdict.
- When reviewing 15-person juries, it was common for researchers to note the existence of side conversations running concurrently within discussions, and for them to comment on the existence of higher levels of interruption and speaking over one another, which was perceived to lead to a less ordered deliberation overall.

However, the higher level of juror participation in 12-person juries was not associated with longer deliberations (there was no difference in deliberation length by jury size) or with any increase in the number of evidential issues discussed or with the extent or accuracy of discussion of legal issues.

In contrast, the majority required did make a significant difference to how long juries deliberated: juries asked to reach a unanimous verdict took substantially longer over deliberations than did those required to reach a simple majority. In terms of juror participation, there were no significant differences in *observed* levels of juror participation by majority required. However, there were some differences in jurors’ own perceptions of their involvement, all of which indicated that those who had been asked to reach a unanimous verdict were a little more likely to feel they had been fully involved and had influenced the decision. Requiring juries to reach unanimity may thus provide more opportunity for everyone to feel that they have been able to put their views across before a verdict is reached. This does not seem to be associated with any increase in the range of evidential issues discussed or the extent or accuracy of discussion of legal issues, however.

The presence or absence of the not proven verdict appeared to have little impact on the key aspects of the decision-making process examined in this research. There were no differences in: the length of time taken to reach a verdict; the mean number of evidential issues raised; the extent or accuracy of the discussion of legal issues (other than discussion of the not proven verdict itself); or levels of juror participation across various measures. However, jurors asked to choose between two verdicts were slightly more likely to say they had been dissatisfied with the experience than jurors who had three verdicts available. This suggests that there might be a small increase in juror dissatisfaction if not proven were not available.

Taken together these findings suggest that:

- **Reducing jury size from 15 to 12** might lead to more jurors participating more fully in the deliberations and is unlikely to have much impact on deliberation length or the range of evidential or legal issues discussed.
- **Moving from requiring juries to reach a simple majority to requiring unanimity or near unanimity** would be likely to increase the average deliberation time (although we cannot say by how much, as the maximum deliberation time was limited to 90 minutes for the purposes of this research),

and may result in jurors being more likely to feel they have had the opportunity to put their views across before a verdict is reached. However, this may not lead to any improvement in the range of evidential or legal issues actually discussed.

- **Removing the not proven verdict** is unlikely to have much impact on key aspects of the jury decision-making process, such as deliberation length or juror participation, but may be associated with a slight increase in juror dissatisfaction.

## 6.2 How do jurors understand the not proven verdict?

Across the 32 mock juries that had not proven as a verdict option, the meaning and consequences of the not proven verdict were rarely discussed at any length during deliberations, even in juries where that verdict was returned. Where the not proven verdict was discussed, however, there was evidence of jurors holding inconsistent understandings of what the verdict meant along with some confusion over its effect. In particular, jurors expressed uncertainty as to how it differed (if at all) from a not guilty verdict.

Although not proven and not guilty have the same effect in law, jurors tended to give different reasons for choosing them. Those who favoured the not proven verdict tended to base this on a belief that the evidence did not prove guilt beyond reasonable doubt, or on the difficulty of choosing between two competing accounts. Jurors choosing the not guilty verdict (where not proven was also an option), on the other hand, tended to attribute this to a belief that the accused was innocent or to some aspect of the complainer's or witness' evidence that suggested that they were not giving a truthful account.

The idea that the not proven verdict should be used when jurors think that the accused is probably guilty but that this has not been proven to the necessary standard arose frequently, albeit briefly, in deliberations. It was also the issue on which there was the clearest agreement in questionnaire responses. Jurors also expressed the (related) view that there would be a lingering stigma attached to receiving a verdict of not proven.

## 6.3 Other implications: supporting juror understanding

As discussed above, there is no evidence from this study that changing one or more of the unique features of the Scottish jury system would have an impact on the number of evidential issues or on the extent or accuracy of legal issues discussed during deliberations.

However, the findings do raise important questions about what can be done to support juror understanding of legal issues, including their understanding of the meaning and effects of the not proven verdict. Several potential misunderstandings on the part of individual jurors (e.g. a belief that the accused should prove their innocence, or a belief that the accused can be retried following a not proven verdict but not a not guilty verdict) arose relatively frequently across the mock juries. This suggests that there may be a need to consider whether jurors require additional guidance (such as written routes to verdict or written reminders of key legal principles) to aid their discussion. A more detailed consideration of this issue can

be found in another strand of this research, which involved an extensive evidence review of ways in which juror communication methods might be improved: see J Chalmers and F Leverick, [\*Methods of Conveying Information to Jurors: An Evidence Review\*](#) (2018).

## Annex A – Full research questions

1. What are jurors' understandings of the not proven verdict and why might they choose one over another verdict?
  - a. What are mock jurors' understanding(s) of the difference between not proven and not guilty verdicts and their consequences (e.g. retrial)?
  - b. What reasons do mock jurors give for why they might choose one verdict over the other?
2. What effects do the unique features of the Scottish jury system (majority, size and the three verdict system) have on jury reasoning and jury decision-making?
  - a. Are there any differences in mock jury verdicts between a two verdict system and a three verdict system? What might explain those differences? (e.g. use and/or understanding of not proven verdict, consideration of evidence, length of deliberation, etc.).
  - b. Where individual mock jurors alter their verdict (between not proven and not guilty) as a result of jury deliberations what reasons do they give for doing so?
  - c. How does jury size (15 person jury compared to a 12 person jury) affect levels of participation of members of a mock jury?
  - d. Are there any differences in mock jury verdicts between a 12 and 15 person jury? What might explain those differences?
  - e. Are there any differences in mock jury verdicts between a simple majority for guilty and unanimity or a qualified majority for any verdict?
  - f. What are the differences (if any) in jury reasoning and decision-making, between requiring a jury to reach unanimity or a qualified majority for any verdict and requiring a jury to reach a guilty verdict by a simple majority? Are there any indications as to how these differences might explain any observed variation in mock jury verdicts between the two verdict systems?
  - g. Does a unanimous verdict or qualified majority confer any advantages over a simple majority verdict? (e.g. whether unanimity encourages a fuller debate of the issues arising and/or the jury to act as a unit).
  - h. What effect, if any, does jury size have on jury reasoning and decision-making (including jury verdict) in a system of unanimity or qualified majority with 2 verdicts? (E.g. does a jury of 15 find it more difficult to reach a unanimous verdict than a jury of 12?).

- i. Are there any differences in mock jury verdicts between a 12 person jury with only 2 possible verdicts (English and Welsh model) and a 15 person jury with 3 verdicts (Scottish model)? Drawing on the results of this simulation and other case simulations, what might explain those differences?
- j. Overall, what do the findings of the mock jury research tell us about how the various independent variables (number of verdicts, simple majority verdict vs. unanimity/qualified majority verdict and jury size) interact with each other?



## Annex B – Assessing mock jury research

The majority of empirical exploration of jury decision-making has been conducted using mock jury studies.<sup>113</sup> This is, in part, a result of legal restrictions which limit the scope for researchers to interview actual jurors about their experience of real criminal trials.<sup>114</sup> Mock jury studies simulate the experience of sitting on a jury by asking participants to read, listen to, or watch trial materials and then return a verdict. The trial materials used are generally fictional and significantly abbreviated in comparison with a real criminal trial.

Mock jury studies vary greatly in the extent to which their findings are generalisable – that is, in how far their findings are likely to apply to real juries, deliberating in actual criminal trials.<sup>115</sup> It is therefore important to understand the research methods used by any mock jury study before assessing how much weight to put on its findings. Four questions in particular need to be considered:<sup>116</sup>

- **How representative was the sample of mock jurors?** Academic mock jury studies sometimes use a convenience sample of students (who often participate in exchange for course credit). This inevitably means that the profile of their ‘mock jurors’ is quite different to that of real jurors in terms of characteristics like age and education. Researchers have debated how much this matters in terms of the wider generalisability of the findings. A meta-analysis has suggested that it makes little difference,<sup>117</sup> although others have disagreed.<sup>118</sup>
- **How realistic were the trial stimulus materials?** To create as realistic an experience as possible, many mock jury studies show participants an audio-visual enactment of a trial (either a video or a live re-enactment). However, other studies have used written trial transcripts or study packs instead. This approach is clearly less realistic in terms of recreating the experience of attending a criminal trial. Even where jurors are shown a video or live re-enactment of a trial, it is important to assess how closely this reflects the reality of a criminal trial (for example, in terms of the accuracy of any legal instructions provided).
- **Did mock jurors deliberate?** Real juries are required to deliberate as a group before returning a collective verdict. However, some mock jury studies do not include this element – they simply ask individual mock jurors what they think the verdict should be after they have read, listened to, or watched the trial materials. Studies that do not include an element of group deliberation are self-evidently

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<sup>113</sup> Although these are not the only methods that have been used. For a more detailed discussion, see J Chalmers and F Leverick, [Methods of Conveying Information to Jurors: An Evidence Review](#) (2018) Annex 1.

<sup>114</sup> In Scotland, see Contempt of Court Act 1981 s 8.

<sup>115</sup> Researchers refer to this as the ‘external validity’ of the study.

<sup>116</sup> The steps we took in the present research to address these issues are outlined in chapter 2.

<sup>117</sup> BH Bornstein and others, “Mock juror sampling issues in jury simulation research: a meta-analysis” (2017) 41 *Law and Human Behavior* 13 at 25.

<sup>118</sup> RL Wiener, DA Krauss and JD Lieberman, “Mock jury research: where do we go from here?” (2011) 29 *Behavioral Sciences and the Law* 467 at 472.

less realistic.<sup>119</sup> Even in studies where deliberation is included, the time allowed for this is sometimes very short. The size of mock juries can also be much smaller than they would be in both Scotland and in most other English language jurisdictions – groups of six to eight are common.

- **How seriously did mock jurors engage with their ‘role’?** Mock jurors are obviously aware that they are role-playing and that, as such, their decisions will not have ‘real’ consequences. That said, there is evidence from some studies that mock jurors engage very conscientiously with their role and express stress regarding their verdict choices.<sup>120</sup> To increase the likelihood of mock jurors taking their task seriously, it is important that studies take as many steps as possible to maximise the solemnity of proceedings, such as using appropriate venues and directing mock jurors about their role in a similar way to real jurors.

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<sup>119</sup> F Leverick, “Jury instructions on eyewitness identification evidence: a re-evaluation” (2016) 49 Creighton Law Review 555 at 566-567.

<sup>120</sup> E Finch and V Munro, “Lifting the veil: the use of focus groups and trial simulations in legal research” (2008) 35 Journal of Law and Society 30 at 45; L Ellison and V Munro, “Getting to (not) guilty: examining jurors’ deliberative processes in, and beyond, the context of a mock rape trial” (2010) 30 Legal Studies 74 at 84; P Ellsworth, “Are twelve heads better than one?” (1989) 52 Law and Contemporary Problems 205 at 223.

## Annex C – Previous research on not proven

### Smithson and others (2007)

Smithson and others' study involved 104 mock jurors reading two trial scenarios – one criminal (murder) and one civil – alongside judicial instructions.<sup>121</sup> Having done so, they were asked to return individual verdicts (rather than deliberating in jury groups).<sup>122</sup> Half of the jurors were initially restricted to returning verdicts of guilty or not guilty, whilst the remainder had the further option of not proven. After completing initial questionnaires, jurors were asked to render their verdict again, but with the alternative set of options to that with which they were initially presented. Having analysed responses across the two conditions, the researchers concluded that “[c]ontrary to the hypothesis that the not proven verdict lures people away from convictions, we find in both trials that it lures them away from full acquittals to a greater extent”.<sup>123</sup> The reference here to ‘full acquittals’ is a reference to a not guilty verdict. As both not guilty and not proven verdicts are full acquittals in the Scottish system, movement from a guilty verdict to a not proven one might be regarded as rather more significant than movement from a not guilty verdict to a not proven one. In any event, the realism of the methods used in this study is particularly low and thus the reliance that can be placed on its findings is accordingly very limited.

### Hope and others (2008)

A further exploration of the impact of a three-verdict system was undertaken by Hope and others, across two different studies.<sup>124</sup> In the first study, 104 mock jurors were provided with a written summary of a sexual assault trial and jury directions. The mock jurors (who again returned verdicts individually rather than deliberating in groups) were randomly assigned to one of two experimental conditions: a two-verdict condition where they returned a verdict of either guilty or not guilty; and a three-verdict condition where they also had the option of a not proven verdict. The difference in acquittal rates was not statistically significant.

In the second study, Hope and others recruited participants to 28 juries (4 to 8 members). Jurors were provided with a written summary of a (non-sexual) assault trial and jury directions. There were three different versions of the trial, with the strength of the prosecution evidence varying (strong, moderate or weak). Half of the juries were restricted to returning a verdict of either guilty or not guilty whilst the rest also had the option of a not proven verdict. The juries were asked to reach a unanimous verdict if possible, and to record the verdict of the majority if not. Here, the research found that the proportion of jurors favouring conviction was higher

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<sup>121</sup> M Smithson, S Deady and L Gracik, “Guilty, not guilty, or...? Multiple options in jury verdict choices” (2007) 20 *Journal of Behavioral Decision Making* 481.

<sup>122</sup> A civil jury would not in fact be asked to return a verdict in the forms “guilty”, “not guilty” or “not proven”. The judicial instructions did, however, instruct the jurors to apply a “balance of probabilities” standard in the civil case.

<sup>123</sup> M Smithson, S Deady and L Gracik, “Guilty, not guilty, or...? Multiple options in jury verdict choices” (2007) 20 *Journal of Behavioral Decision Making* 481 at 486.

<sup>124</sup> Both reported in L Hope and others, “A third verdict option: exploring the impact of the not proven verdict on mock juror decision making” (2008) 32 *Law and Human Behaviour* 241.

where only two verdicts were available (35% rather than 22%, marginally statistically significant), but there was an association between the number of available verdicts and the outcomes (at juror level) only in respect of the “moderate” version of the evidential case.

### **Curley and others (2019)**

Most recently, Curley and others have revisited the effect of the not proven verdict.<sup>125</sup> In this study, 128 mock jurors (primarily student volunteers) listened to two audio vignettes of around six minutes long and were asked to return individual verdicts. Half of participants had the option of returning a not proven, not guilty or guilty verdict when listening to the first vignette, but were restricted to either not guilty or guilty when listening to the second. Meanwhile, the remainder had two verdicts available in the first vignette and three in the second. The difference in conviction rates was not statistically significant. Though it used audio vignettes rather than written summaries, the study shares the limited realism of its predecessors, and – aside from broader concerns about external validity – the fact that participants gave their verdicts under both the two and three-verdict conditions in quick succession may also have affected their verdict choices.

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<sup>125</sup> LJ Curley and others, “The bastard verdict and its influence on jurors”, (2019) 59 *Medicine, Science and the Law* 26.

## **Annex D – Summaries of content of trial videos**

### **Assault trial synopsis**

The complainer (C) and accused (A) had both been drinking in a bar in which they were both regulars. They knew each other by sight. On the night in question, both had been drinking for several hours. The accused attended the bar with three friends. The complainer was with his partner (W). The accused left the bar to smoke outside. There was no-one else present. The complainer left the bar to go home with his partner, but she stopped to speak to a work colleague, meaning that he exited before her. Once outside, he collided with the accused, spilling the accused's drink. What happened afterwards is unclear. The complainer's account (and the prosecution case) is that the accused took a knife from his pocket, lunged at the complainer and stabbed him in his left shoulder. The accused's case is that it was the complainer who produced the knife, which he managed to grab from the complainer during the course of a struggle and which he then used on the complainer in self-defence. The complainer's partner testified that she saw the accused push the complainer to the ground, but on cross-examination admitted that she could not have seen this as she had not left the bar at that point. She was adamant, however, that she saw the accused produce the knife. It was agreed in evidence that both sets of fingerprints were found on the knife, which the complainer explained by testifying that he had picked up the knife after the accused fled the scene. It was also agreed that the complainer sustained a knife wound to his left shoulder that required surgery, leaving a permanent scar of 10cm in length and permanently impairing the movement of his arm.

Sections of Video: Judicial Introduction to Jury; Prosecution Evidence (examination-in-chief of C; cross-examination of C by defence; and re-examination of C; plus examination-in-chief of W and cross-examination of W by defence); Defence Evidence (examination-in-chief of A; cross-examination of A by prosecution; and re-examination of A); Closing Speeches by Prosecution and Defence; Judicial Summing Up and Instructions to the Jury.

### **Rape trial synopsis**

The complainer (C) and accused (A) had been in an eight-month relationship, which ended approximately two months before the alleged offence took place. The accused called at the complainer's home (which they previously shared) to collect some possessions. He and the complainer each drank a glass of wine and some coffee as they chatted. A few hours later, as the accused made to leave, the two kissed. It was the prosecution's case that the accused then tried to initiate sexual intercourse with the complainer, touching her on the breast and thigh, and that the complainer made it clear that she did not consent to this by telling the accused to stop and pushing away his hands. The prosecution alleged that the accused ignored these protestations and went on to rape the complainer. When the accused was questioned by the police, he admitted that he had had sexual intercourse with the complainer, but maintained that all contact was consensual, and this was the approach taken by the defence. A forensic examiner (W) testified that the

complainer had suffered bruising to her inner thighs and chest and scratches to her breasts that were consistent with the application of considerable force, but that – as was not uncommon in cases of rape – she had sustained no internal bruising. The forensic examiner advised that the evidence available following her examination of the complainer was consistent with rape, but that she could not rule out alternative explanations for the injuries.

Sections of Video: Judicial Introduction to Jury; Prosecution Evidence (examination-in-chief of C; cross-examination of C by defence; and re-examination of C; plus examination-in-chief of W; cross-examination of W by defence); Defence Evidence (examination-in-chief of D; cross-examination of D by prosecution; and re-examination of D); Closing Speeches by Prosecution and Defence; Judicial Summing Up and Instructions to the Jury.

## Annex E – Questionnaires

The questionnaires shown here are ‘Version A’, which was given to all 2-verdict juries (those who could choose either a guilty or not guilty verdict). An adapted version (version B) was given to 3-verdict juries (those who could return a guilty, not guilty or not proven verdict). However, as the wording is almost identical (other than the addition of an extra verdict option at relevant questions), we have not included this in the report. Similarly, we have also included ‘Version C’, which was given to ‘spare’ jurors (who did not go on to deliberate) in 2-verdict juries. An equivalent ‘Version D’ (not shown here) was given to ‘spare’ jurors in 3-verdict juries.



**SCOTTISH JURIES RESEARCH  
PRE-DELIBERATION QUESTIONNAIRE Version A**

**DATE OF JURY:**

**JURY REFERENCE LETTER:**

**JUROR ID NUMBER:**

**SERIAL NUMBER:**

**PLEASE COMPLETE THIS QUESTIONNAIRE WITHOUT DISCUSSING YOUR RESPONSES WITH ANYONE ELSE, AND HAND IT TO THE RESEARCHER WHEN COMPLETE.**

## HOW TO COMPLETE THE QUESTIONNAIRE

- Please read each question carefully.
- Answer ALL 4 QUESTIONS.
- Two questions ask you to tick the box ✓ which comes closest to your views. Two questions ask you to write your answer in a box. Please try to write as clearly as possible.
- **If you have any questions, please ask the researcher.**

**Q1** Based on the evidence you have just seen, what do you think the verdict should be? If you are not sure, please say which verdict you would choose if you had to pick one now.

**PLEASE TICK ✓ ONE BOX ONLY**

☐ Guilty

☐ Not guilty

**Q2** Please could you briefly explain why you would choose that verdict?

**PLEASE WRITE IN BELOW**

**Q3** How confident are you that your verdict is the right one?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Very confident
- ☐ Fairly confident
- ☐ Not very confident
- ☐ Not at all confident

**Q4** Why do you feel that way? Please briefly explain your level of confidence in your verdict.

**PLEASE WRITE IN BELOW**

**PLEASE CHECK THAT YOU HAVE ANSWERED ALL FOUR QUESTIONS THEN  
HAND THE QUESTIONNAIRE TO THE RESEARCHER.**

## SCOTTISH JURIES RESEARCH

### POST-DELIBERATION QUESTIONNAIRE Version A

DATE OF JURY:

JURY REFERENCE LETTER:

JUROR ID NUMBER:

SERIAL NUMBER:

**PLEASE COMPLETE THIS QUESTIONNAIRE WITHOUT DISCUSSING YOUR RESPONSES WITH ANYONE ELSE, AND HAND IT TO THE RESEARCHER WHEN COMPLETE.**

### HOW TO COMPLETE THE QUESTIONNAIRE

- Please read each question carefully.
- Answer ALL QUESTIONS unless instructed otherwise.
- Most questions ask you to tick the box ✓ which comes closest to your views. A few questions ask you to write your answer in a box. Please try to write as clearly as possible.
- Some questions are presented in a 'grid'. For these questions, please tick one answer ON EACH ROW.
- **If you have any questions, please ask the researcher.**

## Section 1: Your view on the right verdict

**Q1** By the end of your jury discussion, what did you personally think the verdict should be? If you were not sure, please say which verdict you would have chosen if you had to pick one.

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Guilty  
☐ Not guilty

**Q2** Please could you briefly explain why you thought that was the right verdict?

**PLEASE WRITE IN BELOW**

**Q3** Before you discussed the trial with the other jury members, you filled in a questionnaire that asked what you thought the verdict should be.

Do you still agree with the verdict you chose on that first questionnaire, or had you changed your mind by the end of the discussion?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Yes, still agree with the verdict I chose on first questionnaire → GO TO Q5
- ☐ No, changed my mind by the end of the discussion → GO TO Q4
- ☐ Can't remember what verdict I chose on the first questionnaire → GO TO Q5

IF YOU CHANGED YOUR MIND ABOUT THE VERDICT, PLEASE ANSWER QUESTION 4 (IF YOU DID NOT CHANGE YOUR MIND, SKIP TO Q5)

**Q4** Why did you change your mind?

**PLEASE WRITE IN BELOW**

## Section 2: The verdict your jury reached as a group

**EVERYONE SHOULD ANSWER Q5**

**Q5** Now, we are going to ask about the verdict reached by your jury as a group. In the end, was your jury able to reach a verdict? (This might have been a verdict that most, but not all, of you agreed on).

**PLEASE TICK ✓ ONE BOX ONLY**

☐ Yes → GO TO Q6

☐ No → GO TO Q8

**ANSWER Q6 IF YOU SAID YES AT Q5, YOUR JURY DID REACH A VERDICT IN THE END.**

**IF YOUR JURY WAS NOT ABLE TO REACH A VERDICT, PLEASE SKIP TO Q8**

**Q6a** What verdict did your jury reach as a group?  
**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Guilty
- ☐ Not guilty

**Q6b** Please write in the reasons you think your jury had for reaching that verdict.  
**PLEASE WRITE IN BELOW**

**Q7** How confident are you that the verdict your jury reached is the right one?  
**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Very confident
- ☐ Fairly confident
- ☐ Not very confident
- ☐ Not at all confident



**EVERYONE SHOULD ANSWER Q8**

**Q8** Thinking about your experience of discussing the trial with other jury members, how much would you agree or disagree with each of the following statements?

**ON EACH ROW, PLEASE TICK ✓ ONE BOX**

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Not sure
a) I felt comfortable saying what I thought in front of other jury members	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) I felt that some members of the jury talked too much	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) I felt I was able to say as much as I wanted.....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) I often stayed silent when I had things I wanted to say.....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e) I felt fully involved in the decision that the jury reached.....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f) I felt I was a useful member of the jury	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Q9** If you felt that you were not able to take part in the discussion with other jury members as much as you would have liked, please say briefly why you felt this was the case.

**PLEASE WRITE IN BELOW**

**EVERYONE SHOULD ANSWER ALL OF THE REMAINING QUESTIONS IN THIS QUESTIONNAIRE**

**Q10** On a scale of 1 to 7, where 1 is 'No influence' and 7 is 'A great deal of influence', how much influence do you feel that you, personally, had on the verdict of the jury?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ 1 (No influence)
- ☐ 2
- ☐ 3
- ☐ 4
- ☐ 5
- ☐ 6
- ☐ 7 (A great deal of influence)
- ☐ Don't know

**Q11** Overall, how satisfied or dissatisfied were you with the experience of being a juror today?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Very satisfied
- ☐ Fairly satisfied
- ☐ Neither satisfied nor dissatisfied
- ☐ Fairly dissatisfied
- ☐ Very dissatisfied
- ☐ Don't know

**Q12** In a real Scottish Criminal Court, juries are asked to choose between 3 verdicts – **guilty**, **not guilty** and **not proven**.

On a scale of 1 to 7, where 1 is 'I do not understand the not proven verdict at all' and 7 is 'I fully understand the not proven verdict', how would you rate your understanding of the not proven verdict?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ 1 (I do not understand the not proven verdict at all)
- ☐ 2
- ☐ 3
- ☐ 4
- ☐ 5
- ☐ 6
- ☐ 7 (I fully understand the not proven verdict)

**Q13** Please say whether you think each of these statements is definitely true, probably true, probably not true, or definitely not true.

**ON EACH ROW, PLEASE TICK ✓ ONE BOX**

	Definitely true	Probably true	Probably not true	Definitely not true	Don't know
a) A <u>not proven</u> verdict means that the accused can be tried again for the same crime	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) If the verdict is <u>not proven</u> , the accused still gets a criminal record	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) A <u>not proven</u> verdict should be used when the jurors need to compromise to decide on a verdict .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Q14** And please say whether you think each of these statements is definitely true, probably true, probably not true, or definitely not true.

**ON EACH ROW, PLEASE TICK ✓ ONE BOX**

	Definitely true	Probably true	Probably not true	Definitely not true	Don't know
a) A <u>not guilty</u> verdict means that the accused can be tried again for the same crime	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) If the verdict is <u>not guilty</u> , the accused still gets a criminal record	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) A <u>not guilty</u> verdict should be used when the jurors need to compromise to decide on a verdict .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Q15** What should a jury do if they think the accused is guilty, but do not think the evidence proves it beyond reasonable doubt?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ They should return a verdict of guilty
- ☐ They should return a verdict of not guilty
- ☐ They should return a verdict of not proven
- ☐ They should return either a verdict of not guilty or not proven – it does not matter which of these two verdicts they choose
- ☐ Don't know

### Section 3: About you

Finally, a few questions about you.

**Q16** How would you describe your gender identity?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Man
- ☐ Woman
- ☐ In another way (if you would like to, please tell us what other words you use to describe your gender identity) **(PLEASE TICK ✓ THE BOX AND WRITE IN BELOW)**

**Q17** What is your age?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ 18-24
- ☐ 25-34
- ☐ 35-44
- ☐ 45-54
- ☐ 55-64
- ☐ 65+
- ☐ Prefer not to say

**Q18** Which of the following best describes your employment status?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Employed full time
- ☐ Employed part time
- ☐ In full-time education
- ☐ Retired
- ☐ Looking after the home / full time carer
- ☐ Unable to work due to disability
- ☐ Unemployed
- ☐ Prefer not to say

**Q19** Which of the following is the highest educational or professional qualification you have obtained?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ No formal qualifications
- ☐ SVQ 1-2 or equivalent
- ☐ Standard grade, 'O' grade, GCSE or equivalent
- ☐ Higher grade, A-levels, SVQ level 3 or equivalent
- ☐ HND, HNC, RSA Higher diploma, SVQ level 4 or equivalent
- ☐ Degree, PhD, SVQ level 5 or equivalent
- ☐ Other qualification (**PLEASE TICK ✓ THE BOX AND WRITE IN BELOW**)

- ☐ Unsure
- ☐ Prefer not to say

**PLEASE TAKE A MINUTE TO CHECK YOU HAVE ANSWERED ALL THE QUESTIONS THAT YOU SHOULD HAVE ANSWERED THEN HAND THE QUESTIONNAIRE TO THE RESEARCHER.**

## SCOTTISH JURIES RESEARCH

### PRE-DELIBERATION QUESTIONNAIRE Version C

DATE OF JURY:

JURY REFERENCE LETTER:

JUROR ID NUMBER:

SERIAL NUMBER:

**PLEASE COMPLETE THIS QUESTIONNAIRE WITHOUT DISCUSSING YOUR RESPONSES WITH ANYONE ELSE, AND HAND IT TO THE RESEARCHER WHEN COMPLETE.**

### HOW TO COMPLETE THE QUESTIONNAIRE

- Please read each question carefully.
- Answer ALL QUESTIONS unless instructed otherwise.
- Most questions ask you to tick the box ✓ which comes closest to your views. A few questions ask you to write your answer in a box. Please try to write as clearly as possible.
- Some questions are presented in a 'grid'. For these questions, please tick one answer ON EACH ROW.
- **If you have any questions, please ask the researcher.**



## Section 1: Your view on the right verdict

**Q1** Based on the evidence you have just seen, what do you think the verdict should be? If you are not sure, please say which verdict you would choose if you had to pick one now.

**PLEASE TICK ✓ ONE BOX ONLY**

☐ Guilty

☐ Not guilty

**Q2** Please could you briefly explain why you would choose that verdict?

**PLEASE WRITE IN BELOW**

**Q3** How confident are you that your verdict is the right one?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Very confident
- ☐ Fairly confident
- ☐ Not very confident
- ☐ Not at all confident

**Q4** Why do you feel that way? Please briefly explain your level of confidence in your verdict.

**PLEASE WRITE IN BELOW**

**Q5** In a real Scottish Criminal Court, juries are asked to choose between 3 verdicts – **guilty**, **not guilty** and **not proven**.

On a scale of 1 to 7, where 1 is 'I do not understand the not proven verdict at all' and 7 is 'I fully understand the not proven verdict', how would you rate your understanding of the not proven verdict?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ 1 (I do not understand the not proven verdict at all)
- ☐ 2
- ☐ 3
- ☐ 4
- ☐ 5
- ☐ 6
- ☐ 7 (I fully understand the not proven verdict)

**Q6** Please say whether you think each of these statements is definitely true, probably true, probably not true, or definitely not true.

**ON EACH ROW, PLEASE TICK ✓ ONE BOX**

	Definitely true	Probably true	Probably not true	Definitely not true	Don't know
a) A <u>not proven</u> verdict means that the accused can be tried again for the same crime	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) If the verdict is <u>not proven</u> , the accused still gets a criminal record	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) A <u>not proven</u> verdict should be used when the jurors need to compromise to decide on a verdict .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Q7** And please say whether you think each of these statements is definitely true, probably true, probably not true, or definitely not true.

**ON EACH ROW, PLEASE TICK ✓ ONE BOX**

	Definitely true	Probably true	Probably not true	Definitely not true	Don't know
a) A <u>not guilty</u> verdict means that the accused can be tried again for the same crime	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) If the verdict is <u>not guilty</u> , the accused still gets a criminal record	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) A <u>not guilty</u> verdict should be used when the jurors need to compromise to decide on a verdict .....	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Q8** What should a jury do if they think the accused is guilty, but do not think the evidence proves it beyond reasonable doubt?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ They should return a verdict of guilty
- ☐ They should return a verdict of not guilty
- ☐ They should return a verdict of not proven
- ☐ They should return either a verdict of not guilty or not proven – it does not matter which of these two verdicts they choose
- ☐ Don't know

## Section 2: About you

Finally, a few questions about you.

**Q9** How would you describe your gender identity?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Man
- ☐ Woman
- ☐ In another way (if you would like to, please tell us what other words you use to describe your gender identity) **(PLEASE TICK ✓ THE BOX AND WRITE IN BELOW)**

**Q10** What is your age?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ 18-24
- ☐ 25-34
- ☐ 35-44
- ☐ 45-54
- ☐ 55-64
- ☐ 65+
- ☐ Prefer not to say

**Q11** Which of the following best describes your employment status?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ Employed full time
- ☐ Employed part time
- ☐ In full-time education
- ☐ Retired
- ☐ Looking after the home / full time carer
- ☐ Unable to work due to disability
- ☐ Unemployed
- ☐ Prefer not to say

**Q12** Which of the following is the highest educational or professional qualification you have obtained?

**PLEASE TICK ✓ ONE BOX ONLY**

- ☐ No formal qualifications
- ☐ SVQ 1-2 or equivalent
- ☐ Standard grade, 'O' grade, GCSE or equivalent
- ☐ Higher grade, A-levels, SVQ level 3 or equivalent
- ☐ HND, HNC, RSA Higher diploma, SVQ level 4 or equivalent
- ☐ Degree, PhD, SVQ level 5 or equivalent
- ☐ Other qualification (**PLEASE TICK ✓ THE BOX AND WRITE IN BELOW**)

- ☐ Unsure
- ☐ Prefer not to say

**PLEASE TAKE A MINUTE TO CHECK YOU HAVE ANSWERED ALL THE QUESTIONS THAT YOU SHOULD HAVE ANSWERED THEN HAND THE QUESTIONNAIRE TO THE RESEARCHER.**

# Annex F – Jury record sheet

## SCOTTISH JURIES RESEARCH

### JURY RECORD SHEET

DATE OF JURY:  
p.m (circle)

 a.m /

JURY REFERENCE LETTER:

RESEARCHER COMPLETING THIS FORM:

TRIAL TYPE:

- ☐ Assault  
☐ Rape

NUMBER OF VERDICTS:

- ☐ 2  
☐ 3

VERDICT TYPE:

- ☐ Simple Majority  
☐ Unanimity

NUMBER OF JURORS ATTENDED (spare jurors included)

### DELIBERATION DETAILS

NUMBER OF JURORS THAT DELIBERATED (excluding spare jurors)

DELIB START TIME

DELIB END TIME

TOTAL DELIB TIME (MINUTES)

**FOR UNANIMITY CONDITIONS:  
DID YOU PLAY THE FURTHER INSTRUCTIONS?**

☐ No

☐ Yes

At what time?

**FOREPERSON**

**JUROR NUMBER:**

**GENDER:**

☐ Male

☐ Female

**APPROX AGE:**

**VERDICT RETURNED BY THE JURY:**

☐ Guilty

☐ Not Guilty

☐ Not Proven

☐ Hung (no verdict returned)

**If qualified majority in an Unanimity condition, what was the stated balance of the verdicts? (write in numbers given by foreperson)**

Guilty

Not Proven

Not Guilty

**PRE-DELIBERATION INDIVIDUAL VERDICTS, EXCLUDING SPARE JURORS (from the pre-deliberation questionnaires) – write in number giving each verdict (Q1)**

Guilty

Not Proven

Not Guilty

**POST-DELIBERATION INDIVIDUAL VERDICTS, EXCLUDING SPARE JURORS (from the post-deliberation questionnaires) – write in number giving each verdict (Q1)**

Guilty

Not Proven

Not Guilty



**NOTES:**

(e.g. if the jurors asked questions or tried to return an inadmissible verdict)

# Annex G – Video observation record sheet

## **JURIES MAINSTAGE VIDEO OBSERVATION RECORD – PRIMARY CODER VERSION - CONFIDENTIAL WHEN COMPLETE**

### **General**

- These observation sheets will form a key part of the data for the study, so please ensure you complete fully, and discuss any issues you are not sure about with a colleague.
- Completed sheets should be saved to: O:\CES\17-016941-01 Juries\Mainstage\Analysis\Completed observation sheets\Observation sheets - primary coders. They should be clearly labelled with the Jury date, location and reference letter, your initials, and marked 'CONFIDENTIAL'.
- *Notes on the content* (section 3) – should be completed with reference to output from NVivo coding of the transcript (e.g. data coded under relevant nodes).
- *Notes on the dynamics* (section 4) will usually draw more on viewing the video of the deliberations.

### **Process for adding new codes:**

- The codes below have been developed following viewing of the pilot deliberation films and the first 8 mainstage films, as well as extensive discussion within the team and with the Scottish Government.
- If you feel that there are additional themes that are not fully captured by the codes listed here, please raise this with the rest of the research team in the first instance. If we agree a new code is needed:
  - This will be added to the node list in NVivo
  - An updated version of this observation sheet (and the secondary coder sheet) will be issued
  - We will then to check the relevant sections of transcripts for juries that have already been coded to see whether additional coding is required. We expect that most new codes will be additional sub-themes under – so it should usually simply be a case of inspecting what was coded under the top-level node, and adding further sub-coding where appropriate.

**1. BASIC DETAILS (See Jury record sheet/Excel outcome log – PLEASE TAKE FROM THIS RATHER THAN ESTIMATING)**

<b>Jury date and location</b>	
<b>Jury ID letter</b>	
<b>Rape trial or assault trial?</b>	
<b>Number of verdicts</b>	
<b>Number of jurors deliberating</b>	
<b>Number of spare jurors</b>	
<b>Trial video ID</b>	
<b>Session researcher (who supervised the jury?)</b>	
<b>Deliberation observation sheet completed by</b>	
<b>Length of deliberations in minutes</b>	
<b>UNANIMOUS CONDITION: Was the additional direction read out? At what time?</b>	
<b>Verdict returned (Guilty/Not Guilty/Not Proven/Hung)</b>	
<b>Individual juror verdicts at start (from questionnaires)</b>	
<b>Individual juror verdicts at end (from questionnaires)</b>	
<b><u>Roughly how long did this observation sheet take to complete?</u> (NOTE IF POSSIBLE HOW LONG EACH SECTION TOOK)</b>	

## **2. OVERVIEW OF DELIBERATIONS**

Please make brief notes here (no longer than half a side or so) summarising what you view as the key points – key issues focused on, general impressions of quality of discussion, overall jury dynamics, extent/nature of discussion of NP verdict. Also include brief notes on whether jurors appear to be engaging seriously with their task and treating it (as far as possible) as ‘real’.

### 3. THE CONTENT

This section focuses on the **CONTENT** of the deliberations – **WHAT** was said. The dynamics of **HOW** things were said and the interactions between jurors should be logged in section 4.

#### a) DISCUSSION OF THE EVIDENCE

Purpose is to map the range of issues of evidence discussed in each jury – less concerned with content/what they thought of each.

Discussion of the law/specific legal tests and of the Not Proven verdict are covered in sections b) and c).

Issue	Was it discussed? (Y/N – with reference to the coded NVivo data)	BRIEF notes on any particularly salient points re. <u>quality</u> / <u>extent</u> of discussion. Focus on <u>quality/extent</u> rather than precise <b>CONTENT</b> .
<b>CREDIBILITY</b>	CODE ROWS BELOW	
3.1.1 - Demeanour of the <b>accused</b> on the stand (inc. comments that seemed honest)		
3.1.2 - Demeanour of the <b>complainer</b> on the stand (inc. comments that seemed honest)		
3.1.3 - Demeanour of the <b>witness</b> on the stand (inc. comments that seemed honest)		
3.1.4 - Believability / wider credibility of the <b>accused</b> (e.g. whether found story plausible or thought motivated to lie)		
3.1.5 - Believability / wider credibility of the <b>complainer</b> (e.g. whether found story plausible or thought motivated to lie)		

3.1.6 - Believability / wider credibility of the <b>witness</b> (e.g. whether found story plausible or thought motivated to lie)		
3.1.7 - Difficulties of <b>choosing between conflicting accounts</b> in general (he said/she said etc.)		
<b>3.2 - LEVEL OF CONSUMPTION OF ALCOHOL BY PARTIES INVOLVED</b>		
<b>3.3 - INJURIES</b>	CODE ROWS BELOW	
<b>3.3.1 - Complainer's</b> injuries – discussion of their nature/likely cause		
<b>3.3.2 - Accused's</b> injuries – discussion of whether/why not injured		
<b>3.4 - POSITION OF PARTIES during incident</b>	CODE ROWS BELOW	
3.4.1 - Fact intercourse took place on floor (RAPE TRIAL)		
3.4.2 - Position during intercourse (e.g. account of arm across chest, her underneath etc.) (RAPE TRIAL)		
3.4.3 - Position of parties during fight (ASSAULT TRIAL)		
3.4.4 - Position of witness during incident/likelihood of seeing incident (ASSAULT)		
<b>3.5 - POSSESSION/OWNERSHIP OF KNIFE (ASSAULT)</b>		

<b>3.6 - BEHAVIOUR OF <u>ACCUSED</u> BEFORE/DURING/AFTER THE INCIDENT</b>	CODE ROWS BELOW	
3.6.1 - Accepting wine (RAPE TRIAL)		
3.6.2 - Nature of conversation before incident (RAPE TRIAL)		
3.6.3 - Coming up again after dropping TV in car (RAPE)		
3.6.4 - Leaving scene after the incident (BOTH)		
3.6.5 - Why didn't phone ambulance (ASSAULT)		
3.6.6 - Other aspect of behaviour of accused		
<b>3.7 - BEHAVIOUR OF THE <u>COMPLAINER</u> BEFORE/DURING/AFTER THE INCIDENT</b>	CODE ROWS BELOW	
3.7.1 - Two previous phone calls (RAPE TRIAL)		
3.7.2 - Offering wine/inviting him over (RAPE TRIAL)		
3.7.3 - Reaction during incident (RAPE TRIAL) – e.g. level of resistance/whether shouted for help		
3.7.4 - Phonecall to sister (RAPE TRIAL)		
3.7.5 - (Timing of) phonecall to police (RAPE TRIAL)		
3.7.6 - Showering (RAPE TRIAL)		

3.7.7 - Arguing with partner (ASSAULT)		
3.7.8 - Picking up the knife after being stabbed (ASSAULT)		
3.7.9 - Other aspect of behaviour of complainer		
<b>3.8 - BEHAVIOUR of witness</b> before/during/after incident (ASSAULT)		
<b>3.9 - Other elements</b> of evidence – SEE ABOVE ON ADDING NEW CODES		
<b>3.10 – Missing evidence</b> ( <i>any discussion around things that weren't part of the evidence – e.g. previous sexual relationship</i> )		

## b) DISCUSSION OF THE LAW/ LEGAL TESTS

Purpose is to map the range of LEGAL ISSUES raised in each jury.

Discussion of the evidence and of the Not Proven verdict are covered in sections a) and c)

Issue	Was it discussed? (Yes/No – with reference to the coded data)	BRIEF notes on any particularly salient points re. <u>quality</u> / <u>extent</u> of discussion. Focus on <u>quality/extent</u> rather than precise CONTENT.
<b>4.1 - SELF-DEFENCE (ASSAULT)</b>	CODE ROWS BELOW	
4.1.1 - General discussion of plausibility of the self-defence argument		



4.1.2 - Specific references to reasonable belief in imminent danger of attack		
4.1.3 - Specific reference to violence as last resort		
4.1.4 - Specific reference to reasonable amount of force to stop an attack		
<b>4.2 - LEGAL TESTS FOR RAPE</b>	CODE ROWS BELOW	
4.2.1 - Whether evidence suggests complainer consented or not		
4.2.2 - Whether accused had reasonable belief in consent		
<b>4.3 - CORROBORATION</b>	CODE ROWS BELOW	
4.3.1 - Discussion of meaning of corroboration		
4.3.2 - Discussion of whether witness' account corroborates complainer or not		
<b>4.4 - REASONABLE DOUBT/ STANDARD OF PROOF</b>	CODE ROWS BELOW	
4.4.1 - Discussion of meaning of reasonable doubt / standard of proof		
4.4.2 - Discussion of whether evidence leaves reasonable doubt /reaches standard of proof or not		

<b>4.5 - MISUNDERSTANDINGS OF LEGAL ISSUES</b>	<b>On how many separate occasions was this misunderstanding <u>expressed</u>?</b> <i>(Discussion in <u>one section of the deliberations counts as one occasion</u>, even if statement is repeated during this section. If a statement is <u>made</u>, then <u>re-introduced after a change of topic</u>, this counts as 2 separate occasions).</i>	<b>On how many of the occasions it was raised was this misunderstanding <u>challenged</u>?</b> <i>(See left for definition of how to count separate occasions)</i>	<b>Summary notes on <u>what was discussed</u> and <u>what happened as result of any challenge to misunderstandings</u>.</b> Does challenge result in corrected understanding among jury (as far as you can tell), or do misunderstandings persist?
4.5.1 - Belief that <u>need to prove innocence</u> in order to be found Not Guilty			
4.5.2 - ASSAULT – <u>misunderstanding of fact ‘self-defence’ is a legitimate defence</u> for assault (i.e. think guilty because stabbed him, regardless of whether it was self-defence)			

4.5.3 - Other <u>probable misunderstanding</u> (DESCRIBE ON RIGHT) – additional codes to be created if necessary, using process above.			
<b>4.5.4 - OTHER LEGAL ISSUES/ASPECTS – see above on adding new codes</b>			

**c) DISCUSSION OF THE NOT PROVEN VERDICT**

**For this section, in contrast with b) and c), we are also more interested in the detailed CONTENT of discussion of Not Proven, not just the range of points made.**

- i. How much substantive discussion of the Not Proven verdict was there? I.e. discussion of its meaning/how it compares with NG.** If reasons for choosing NP were given – e.g. as part of the round table - but without any elaboration on why it was chosen over NG or what people think NP means, then note this separately below. **(delete as appropriate and add brief notes, including noting number of words coded under ‘Not Proven’ theme in NVivo, so we can check consistency of interpretation)**
  - None at all
  - Only minimal/brief references
  - **In some detail**
- ii. What correct, incorrect, and other statements were made about the NP verdict? COMPLETE TABLE WITH REFERENCE TO NVIVO CODED DATA**

STATEMENT	On how many separate occasions was this statement expressed? <i>(Discussion in <u>one section of the deliberations counts as one occasion</u>, even if statement is repeated during this section. If a statement is <u>made</u>, then <u>re-introduced after a change of topic</u>, this counts as 2 separate occasions).</i>	On how many of the occasions it was raised was this statement challenged? <i>(See left for definition of how to count separate occasions)</i>	Summary notes on <u>what was discussed</u> and <u>what happened as result of any challenge</u> to statements about NP. Does challenge result in corrected understanding among jury (as far as you can tell), or do misunderstandings persist?
5.1.1 - Can be retried if NP (F)			
5.1.2 - NP verdict goes on accused's criminal record (F)			
5.1.3 - You should use NP if have not			

proven innocence (F)			
5.1.4 - Legal consequences of NP are same as NG (T)			
5.1.5 - Cannot be retried if NP (T)			
5.1.6 - Do not get any kind of record if NP (T)			
5.1.7 - 'Stigma' attached to NP verdict			
5.1.8 - 'NP means Guilty but can't prove it'			
5.1.9 – Would normally have NP in Scotland			

(2 verdict conditions)			
5.1.10 - Other statement about NP verdict – SEE ABOVE ON ADDING NEW CODES			

- iii. (How) is NP **compared to Not Guilty?** And to **Guilty?** (**SUMMARISE WITH REFERENCE TO NVIVO CODED DATA**)
- iv. Where Jurors are considering or go for a NP verdict, what, if any, **reasons do they give for choosing it over Guilty or Not Guilty?** (**SUMMARISE WITH REFERENCE TO NVIVO CODED DATA**)
- v. **Anything else noteworthy** about how NP is discussed?

#### **4. OBSERVATIONS OF JUROR DYNAMICS/INTERACTIONS**

***Include time stamps of specific examples of interactions that demonstrate observations where possible***

**i. FOREPERSON:**

- Which juror was foreperson? (Record number, gender – will get age from SPSS)
- How was this decided (e.g. vote/someone nominated self or what?)
- At roughly what stages/times?
- What were the numbers for each verdict at each vote?
- Note whether jurors were asked to go round and explain their verdict at each stage (i.e. how many 'round tables' like this did they have after votes?)

**ii. DOMINANT JURORS:**

- Were there any dominant jurors, meaning in this case any jurors who contribute very obviously substantially more than most other jurors?
  - Note their juror number and genders (will get age from SPSS).
- What, if any, impact did this dominance *appear* to have on other jurors (e.g. changing mind, not contributing, or challenging dominant jurors? Acknowledging that may be difficult to judge this)

**iii. CONTRIBUTIONS BY JURORS**

**It is difficult to define what counts as 'minimal contributions' – sometimes people make few but lengthy contributions, for example. However, broadly speaking, someone would be classed as only having contributed minimally if they make fewer than 3 contributions, excluding:**

- non-verbal contributions (nodding)
- simple agreement (e.g. 'yes I agree' with no expansion)
- very short contributions that are only made directly in response as part of a 'going round the table' after a vote to explain their verdict.

**If someone makes fewer than 3 contributions, but one or more contribution is more extended, you may decide they have nonetheless contributed more than minimally (please note where this is the case). As you watch the video, tick off jurors when you feel confident that they have contributed more than minimally, based on the criteria above.**



Juror number	SPACE TO TICK OFF CONTRIBUTIONS	Juror number	SPACE TO TICK OFF CONTRIBUTIONS
1		9	
2		10	
3		11	
4		12	
5		13	
6		14	
7		15	
8			

- How many jurors contributed only minimally (i.e. did not meet descriptions above)? Note any you were not sure about (and x-check with the secondary coders' rating).
- Note their juror numbers, genders (will get age from SPSS)
- Overall, how frequently did you observe jurors apparently wanting to contribute but being unable to do so (e.g. being cut off/interrupted/obviously wanting to interject but being unable to do so)?
  - Not at all in this jury
  - Only very occasionally
  - Only during specific sections of discussion (say which), or
  - Regularly throughout the jury?

iv. **ATTEMPTS TO PERSUADE/INFLUENCE OTHER JURORS:**

- Did jurors try directly to persuade others in the jury to change their verdict?
- In what direction? How did they try and persuade them?
- How hard did they appear to try?
- What was the outcome of these attempts?

v. **tone of discussion**

- Was the overall tone of discussion between jurors (delete/highlight as appropriate):
  - always/almost always completely calm (*can use if very occasionally slightly heated – if more than that use another code*)

- occasionally more heated/animated
  - frequently more heated/animated?
- Please add notes on the focus/nature of any more heated/animated *disagreements*. Were these resolved or not?

vi. **Any other observations on juror interactions?**

## Annex H – Statistical tests

The following kinds of statistical tests were used in analysis of the quantitative data included in this report:

- Observed differences between jury-level outcomes, where these can be expressed as percentages (e.g. % giving different verdicts), were tested using CHI-Squared and/or Fisher's exact. Fisher's exact is a more precise test that is used when the analysis includes cell sizes under 5 cases (as they often were at jury level, given there were 64 juries).
- Differences in means (e.g. mean scores on questions on a scale at juror level, or mean length of deliberations at jury level) were tested using 2 way ANOVAs.
- Differences in juror-level responses to questions in the pre- and post-deliberation questionnaires were tested using either a CHI-squared test or a 2-way T-test. CHI-squared was used when testing in general whether there was any variation in response to, for example, a 5 point agree-disagree question by condition. T-tests were used to check whether there was a significant difference on a specific response category (e.g. % agreeing), or when the number of possible responses was very high (e.g. reasons for choosing a particular verdict) so it made sense only to test those that could be significantly different (rather than testing every single category).
- Logistic regression analysis was used in a number of cases to control for interactions between variables and establish which factors were most significantly associated with any difference observed. For example, logistic regression was used to examine which factors were most strongly associated with individual jurors favouring a guilty verdict post-deliberation.

## Annex J – Additional tables

Table J.1 – Mean length of jury deliberations BY experimental condition

Condition	Mean length of deliberations (mins)	Min length	Max length (90 was max possible)	Number of juries
<b>ALL 64 juries</b>	45	14	90	64
<b>Trial type</b>				
Assault trial	37	14	82	32
Rape trial	54	22	90	32
<b>Number of verdicts</b>				
2-verdict conditions	46	14	90	32
3-verdict conditions	45	18	90	32
<b>Number of jurors</b>				
12-person juries	43	14	90	32
15-person juries	48	20	90	32
<b>Majority type</b>				
Simple majority	37	14	90	32
Unanimous	54	20	90	32

Table J.2 – Frequency with which jurors observed wanting to contribute, but being unable to do so BY condition (number of juries)

Condition	Not at all / only occasionally / only in specific sections	Regularly throughout the jury	<i>Number of juries</i>
<b>ALL 64 juries</b>	49	15	64
<b>Trial type (sig.)</b>			
Assault trial	20	12	32
Rape trial	29	3	32
<b>Number of verdicts (NOT sig.)</b>			
2-verdict conditions	24	8	32
3-verdict conditions	25	7	32
<b>Number of jurors (sig.)</b>			
12-person juries	30	2	32
15-person juries	19	13	32
<b>Majority type (NOT sig.)</b>			
Simple majority	26	6	32
Unanimous	23	9	32

Table J.3 – Mean number of jurors identified as dominant BY condition

<b>Condition</b>	<b>Mean number of dominant jurors</b>	<b>Min.</b>	<b>Max.</b>	<b><i>Number of juries</i></b>
<b>ALL 64 juries</b>	1.4	0	5	64
<b>Trial type (sig.)</b>				
Assault trial	1.9	0	4	32
Rape trial	1.0	0	5	32
<b>Number of verdicts (NOT sig.)</b>				
2-verdict conditions	1.6	0	5	32
3-verdict conditions	1.3	0	3	32
<b>Number of jurors (sig.)</b>				
12-person juries	1.0	0	5	32
15-person juries	1.8	0	4	32
<b>Majority type (NOT sig.)</b>				
Simple majority	1.3	0	4	32
Unanimous	1.6	0	5	32

Table J.4 – Mean number of jurors identified as ‘minimally contributing’ BY condition

Condition	Mean number of minimally contributing jurors	Min.	Max.	<i>Number of juries</i>
<b>ALL 64 juries</b>	2.0	0	7	64
<b>Trial type (sig.)</b>				
Assault trial	2.6	0	7	32
Rape trial	1.5	0	6	32
<b>Number of verdicts (NOT sig.)</b>				
2-verdict conditions	2.1	0	6	32
3-verdict conditions	2.0	0	7	32
<b>Number of jurors (sig.)</b>				
12-person juries	1.6	0	5	32
15-person juries	2.5	0	7	32
<b>Majority type (NOT sig.)</b>				
Simple majority	2.0	0	7	32
Unanimous	2.0	0	6	32

Table J.5 – Proportion of jurors who agreed/disagreed with ‘I felt that some members of the jury talked too much’ BY condition (row %)

Condition	Agree/ Strongly agree	Neither	Disagree/ Strongly disagree	Base (number of jurors, excluding ‘Not sure’ or Not Answered)
<b>ALL 64 juries</b>	35%	24%	41%	837
<b>Trial type (NOT sig.)</b>				
Assault trial	35%	23%	42%	415
Rape trial	36%	25%	39%	422
<b>Number of verdicts (sig.)</b>				
2-verdict conditions	38%	25%	37%	420
3-verdict conditions	33%	22%	45%	417
<b>Number of jurors (sig.)</b>				
12-person juries	28%	24%	48%	373
15-person juries	41%	24%	35%	464
<b>Majority type (NOT sig.)</b>				
Simple majority	37%	23%	40%	418
Unanimous	34%	25%	42%	419



Table J.6 – Mean influence score (1-7, where 1 = no influence and 7 = a great deal of influence) BY condition

Condition	Mean perceived influence score	Base (all jurors who deliberated, excluding 'don't know' / not answered)
ALL 64 juries	4.3	827
<b>Trial type (NOT sig.)</b>		
Assault trial	4.3	418
Rape trial	4.3	409
<b>Number of verdicts (NOT sig.)</b>		
2-verdict conditions	4.3	409
3-verdict conditions	4.3	418
<b>Number of jurors (sig.)</b>		
12-person juries	4.5	367
15-person juries	4.1	460
<b>Majority type (sig.)</b>		
Simple majority	4.1	421
Unanimous	4.5	406

Table J.7 – Difference in observed tone of jury deliberations BY condition (number of juries)

Condition	Always / almost always completely calm	Occasionally more heated / animated	Frequently heated / animated	<i>Number of juries</i>
<b>ALL 64 juries</b>	27	22	15	64
<b>Trial type</b>				
Assault trial	16	6	10	32
Rape trial	11	16	5	32
<b>Number of verdicts</b>				
2-verdict conditions	10	12	10	32
3-verdict conditions	17	12	5	32
<b>Number of jurors</b>				
12-person juries	16	12	4	32
15-person juries	11	10	11	32
<b>Majority type</b>				
Simple majority	16	12	4	32
Unanimous	11	10	11	32

Table J.8 – Juror confidence in the verdict returned BY condition (row %, all jurors except those in hung juries)

Condition	Very / fairly confident	Not very / not at all confident	Base (all jurors except hung juries and those 'Not sure' or Not Answered)
<b>ALL 64 juries</b>	81%	19%	716
<b>Trial type (sig.)</b>			
Assault trial	89%	11%	366
Rape trial	73%	27%	350
<b>Number of verdicts (sig.)</b>			
2-verdict conditions	78%	22%	330
3-verdict conditions	83%	17%	386
<b>Number of jurors (NOT sig.)</b>			
12-person juries	82%	18%	330
15-person juries	80%	20%	386
<b>Majority type (sig.)</b>			
Simple majority	76%	24%	408
Unanimous	87%	13%	308

Table J.9 – Difference in observed level of substantive discussion of the not proven verdict BY condition (number of juries)

Condition	None at all	Brief references	In some detail	<i>Number of juries</i>
<b>ALL 64 juries</b>	21	28	15	64
<b>Trial type</b>				
Assault trial	13	15	4	32
Rape trial	8	13	11	32
<b>Number of verdicts</b>				
2-verdict conditions	16	12	4	32
3-verdict conditions	5	16	11	32
<b>Number of jurors</b>				
12-person juries	8	17	7	32
15-person juries	13	11	8	32
<b>Majority type</b>				
Simple majority	12	13	7	32
Unanimous	9	15	8	32

Table J.10 – Juror views on the appropriate verdict to return if they think the accused is guilty but the evidence does not prove it beyond reasonable doubt, BY experimental condition

Condition	Return guilty verdict	Return not guilty verdict	Return not proven verdict	Return either not guilty or not proven	Don't know/ not answered	<i>Number of Jurors (all participants)</i>
<b>ALL 64 juries</b>	5%	12%	70%	7%	6%	969
<b>Trial type (sig.)</b>						
Assault trial	8%	13%	64%	8%	7%	478
Rape trial	3%	11%	75%	6%	4%	491
<b>Number of verdicts (sig.)</b>						
2-verdict conditions	4%	20%	63%	8%	5%	484
3-verdict conditions	7%	5%	77%	6%	6%	485
<b>Number of jurors (NOT sig.)</b>						
12-person juries	4%	12%	71%	7%	5%	425
15-person juries	6%	12%	69%	7%	6%	544
<b>Majority type (sig.)</b>						
Simple majority	6%	11%	73%	6%	5%	488
Unanimous	5%	14%	66%	9%	7%	481

Table J.11 – Rape trial jurors’ stated reasons for initial view on the verdict (three-verdict condition only)

	<b>Guilty</b>	<b>Not guilty</b>	<b>Not proven</b>
General references to whether there is enough evidence to convict and/or references to missing evidence/additional evidence needed	42%	58%	64%
Reference to specific element(s) of the evidence presented	76%	65%	42%
Specific references to corroboration or whether witness account is consistent/compelling	24%	28%	37%
Specific references to whether evidence proves 'beyond reasonable doubt' or meets standard of proof	9%	19%	34%
Difficulty choosing between accounts of complainer and accused	2%	12%	28%
Perceived credibility or reliability of the witness	34%	19%	21%
Perceived credibility or reliability of the complainer	66%	33%	20%
Perceived credibility or reliability of the accused	41%	16%	12%
References to whether specific legal arguments are plausible or tests met (i.e. whether evidence suggests consent, or reasonable belief in consent)	35%	28%	12%
Reason suggesting a legal misunderstanding (e.g. saying the accused has not proven innocence)	2%	0%	0%
<i>Sample size</i>	<i>88</i>	<i>43</i>	<i>113</i>

Table J.12 – Assault trial jurors’ stated reasons for initial view on the verdict (three-verdict condition only)

	<b>Guilty</b>	<b>Not guilty</b>	<b>Not proven</b>
Reference to specific element(s) of the evidence presented	73%	59%	60%
General references to whether there is enough evidence to convict and/or references to missing evidence/additional evidence needed	41%	42%	60%
Perceived credibility or reliability of the witness	18%	53%	45%
References to whether specific legal arguments are plausible or tests met (i.e. whether evidence suggests consent, or reasonable belief in consent)	68%	41%	35%
Perceived credibility or reliability of the complainer	14%	37%	24%
Specific references to corroboration or whether witness account is consistent/compelling	5%	28%	24%
Perceived credibility or reliability of the accused	9%	22%	22%
Specific references to whether evidence proves 'beyond reasonable doubt' or meets standard of proof	2%	13%	18%
Difficulty choosing between accounts of complainer and accused	2%	6%	17%
Reason suggesting a legal misunderstanding (e.g. saying the accused has not proven innocence)	27%	2%	1%
<i>Sample size</i>	<i>44</i>	<i>64</i>	<i>125</i>

Table J.13: Rape trial jurors' specific evidence cited in reasons for initial view on the verdict (three-verdict condition only)

	Guilty	Not guilty	Not proven
Nature, extent or likely cause of complainer's injuries	58%	23%	32%
Medical evidence enough, or not enough, or other reference to doctor's evidence	13%	14%	24%
Lack of other evidence, missing evidence, photos, CCTV, other witnesses	2%	9%	9%
Complainer offering wine or inviting him over	0%	21%	7%
They kissed, he kissed her, and/or she kissed him back	9%	19%	6%
Complainer phoning accused previously	5%	16%	5%
Nature, extent or likely cause of accused's injuries or lack thereof	0%	7%	4%
Complainer's reaction during incident	7%	2%	4%
Still had feelings for each other	1%	7%	4%
Accused coming up again after dropping TV	8%	7%	3%
Timing of complainer's phone call to police	11%	16%	3%
Listened to discussion or convinced by what other jurors said	2%	0%	2%
Nature of conversation before alleged rape	2%	9%	2%
Complainer's phone call to sister	2%	9%	2%
Level of alcohol consumed	0%	5%	1%
Fact intercourse on the floor	1%	0%	1%
Showering after incident	0%	2%	1%
Accused leaving scene after incident	0%	2%	0%
Position during intercourse	6%	9%	0%
Accused accepting wine	2%	0%	0%
<i>Sample size</i>	88	43	113



# Annex K – Remit and membership of the Research Advisory Group

The remit of the Research Advisory Group was to:

- Monitor general progress of the research;
- Provide a forum for collaborative issues resolution;
- Keep policy and key stakeholders informed and provide an opportunity for them to discuss the research directly with the researchers;
- Provide a forum for researchers to explain the potential and the limits of the research;
- Assist researchers by providing advice, contacts, introductions and access to data where relevant;
- Advise, when appropriate, on technical (e.g. legal) aspects of the research;
- Advise on the content and presentation of the research reports;
- Provide feedback on interim and final reports (quality control);
- Advise on an appropriate dissemination strategy.

The membership of the Research Advisory Group was:

- Willie Cowan, Deputy Director Criminal Justice (**Chair**)
- Lesley Bagha, Head of Criminal Justice Reform & Licensing Unit (**Deputy Chair**)
- Karen Auchincloss, Criminal Justice Reform Team Leader (Policy Lead)
- Tamsyn Wilson, Senior Researcher, Justice Analytical Services (SG Contract Manager) / Catherine Bisset, Principal Researcher, Justice Analytical Services (SG Contract Manager)
- Kay McCorquodale, Scottish Courts and Tribunals Service
- Sheriff Duff, Judicial Institute
- Lord Turnbull
- John Scullion QC, Faculty of Advocates
- Anthony McGeehan, Crown Office and Procurator Fiscal Service
- Michael Walker, Law Society of Scotland
- Lorraine Murray, Ipsos Mori (Deputy Managing Director)
- Rachel Ormston, Ipsos Mori (Research Director)
- Professor Fiona Leverick, University of Glasgow
- Professor James Chalmers, University of Glasgow
- Professor Vanessa Munro, University of Warwick

Source data availability is subject to consideration of legal, data protection and ethical factors.



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